Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Have the Petitioners been deprived of their rights, under the United States Constitution, to due process and equal protection of law by the decision of the Supreme Court of Ohio barring them from access to Ohio's courts for the enforcement of a final judgment, including remedial orders, entitling Petitioners to affirmative relief?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are public school pupils, parents, teachers, school administrators, school boards, and school board members, who were plaintiffs in a successful challenge to the constitutionality of Ohio's public school funding system.

The specific Petitioners include: Dale R. DeRolph, parent and next friend of Nathan DeRolph; Randy Miskell; the Board of Education of the Northern Local School District; J. Kenneth Miller; Steven Johnson; Keely Thompson, parent and next friend of Christopher Thompson; Joseph Winnenberg; the Board of Education of the Southern Local School District; Louis Altier; Carol Spangler; Donna Blankenship, parent and next friend of Jami Blankenship; Mark Semanco; the Board of Education of the Dawson-Bryant Local School District; Carl Swartzwelder; Wayne White; David Bowers, parent and next friend of Christopher Bowers; Jon Carver; the Board of Education of the Lima City School District; James Eaton; Charles Buroker; Marion Gary Southers, Jr., parent and next friend of Sherri Southers and Brian Southers; Robert Rios; the Board of Education of the Youngstown City School District; Socrates Kolitsos; and Emanuel Catsoules. The foregoing Petitioners are collectively referred to herein as the "*DeRolph* Plaintiffs."

Additionally, the Ohio Coalition for Equity & Adequacy of School Funding, a duly constituted regional council of governments whose mission is to ensure a constitutional system of public school funding in Ohio, is also a Petitioner.

Judge Linton D. Lewis, Jr. and the Court of Common Pleas of Perry County, Ohio are not Petitioners.

Respondent

Respondent is the State of Ohio ("State").

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment rendered in this case by the Supreme Court of Ohio.

OPINIONS BELOW

The decision advanced for review is reported at *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (2003) ("*Lewis*") (App. 1a-15a). That decision is an outgrowth of four previous decisions of the Supreme Court of Ohio, each holding Ohio's public school funding system unconstitutional, in violation of Section 2 of Article VI of the Ohio Constitution. Those decisions, in order of issuance, are reported at *DeRolph v. State,* 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) ("*DeRolph I*"); *DeRolph v. State,* 78 Ohio St.3d 419, 678 N.E.2d 886 (1997) ("*DeRolph I* on reconsideration"); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) ("*DeRolph II*"); *DeRolph v. State*, 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) ("*DeRolph III*"); *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) ("*DeRolph IV*") (App. 17a-46a).

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered its final judgment granting the State of Ohio's complaint for writ of prohibition on May 16, 2003. Petitioners respectfully invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution (App. 51a), which provides in relevant part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Section 2 of Article VI of the Ohio Constitution provides in relevant part as follows: "The general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state . . . ." (App. 52a). In 1991, the *DeRolph* Plaintiffs initiated a lawsuit in the Perry County Court of Common Pleas ("trial court") against the State of Ohio and its educational agencies challenging the constitutionality of Ohio's elementary and secondary public school funding system under this and other provisions of the Ohio Constitution. The *DeRolph* Plaintiffs asserted that an overreliance on revenue from local property taxation had yielded profound inequities across Ohio's school districts in everything from school facilities to supplies and curriculum, resulting in constitutionally inadquate levels of educational opportunity being available to many of Ohio's public school pupils. The complaint sought a declaration that Ohio's system of funding public education was unconstitutional and injunctive relief requiring the State to remedy the unconstitutional shortcomings in the system. In an unreported

decision, the trial court declared in July of 1994 that Ohio's school funding system violated the Ohio Constitution, and the court issued remedial orders. (App. 80a-88a).

After a reversal by the appellate court, the Supreme Court of Ohio confirmed on March 24, 1997 that the State had failed in its constitutional duty to provide a thorough and efficient system of public education. *DeRolph I.* Citing "overwhelming" evidence that Ohio's schools "desperately lack the resources necessary to provide students with a minimally adequate education," the Supreme Court of Ohio declared Ohio's system of funding public schools unconstitutional. *Id.* at 197, 210.[1] The court directed that "Ohio's public school financing scheme must undergo a complete systematic overhaul" and ordered the legislature to eliminate four specific elements of the funding system "which contribute to the unworkability of the system." *Id.* at 212.[2]

The Supreme Court of Ohio stayed the effective date of its decision to permit the enactment of remedial legislation. The case was remanded to the trial court to conduct a hearing and issue findings as to whether the anticipated remedial

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[1] The court concluded that schools were "starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *DeRolph I* at 205.

[2] The factors identified were: "(1) the operation of the School Foundation Program, (2) the emphasis of Ohio's school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings." *DeRolph I* at 212.

legislation satisfied the mandates of the Supreme Court of Ohio. After an evidentiary hearing in the fall of 1998, the trial court concluded that the State had failed to comply with the *DeRolph I* mandates. *DeRolph v. State*, 98 Ohio Misc.2d 1, 712 N.E.2d 125 (1999). Accordingly, the trial court ordered the State to undertake specific steps to remedy the continuing constitutional infirmities in Ohio's school funding system. *Id.* at 263.

The State immediately appealed the trial court's decision directly to the Supreme Court of Ohio, as authorized in *DeRolph I* on reconsideration. On May 11, 2000, the Supreme Court of Ohio concurred with the determination of the trial court and again declared that the State remained in violation of its constitutional mandate to provide a thorough and efficient system of public schools. *DeRolph II.* The court reiterated its earlier remedial order that the General Assembly undertake a "complete systematic overhaul" of school funding. *Id.* at 17. Additionally, the court explained and clarified its earlier remedial orders, expanding to seven the list of elements within the funding system that required attention from the legislature. *Id.* at 37.[3] The court again stayed the effective date of its decision, this time retaining

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[3] The areas requiring scrutiny and further action by the legislature were: (1) the continued overreliance on local property taxes as a primary means to fund Ohio's schools; (2) structural deficiencies in the basic aid formula; (3) "the mechanism implemented to fund the construction of new school facilities and to repair older, decaying school buildings, until the task is complete"; (4) reevaluation of the legislatively enacted School Solvency Assistance Fund; (5) the necessity to address and immediately fund "unfunded mandates"; (6) the elimination of "[t]he phenomenon known as phantom revenue"; and (7) the development and rigorous enforcement of "[s]trict, statewide academic guidelines." *DeRolph II* at 37.

jurisdiction to review the legislation enacted in response to its remedial orders.

On September 6, 2001, the Supreme Court of Ohio issued its third *DeRolph* decision, again holding that the State had failed to provide a school funding system compliant with the Ohio Constitution. *DeRolph III*. The court indicated that the legislation presented for review "would be" constitutional if the State made certain specific changes to the school funding formula. *Id.* The State, however, moved for reconsideration. The State's motion was granted, and in lieu of a decision on the merits of reconsideration, the court ordered the parties to mediation. *DeRolph v. State*, 93 Ohio St.3d 628, 758 N.E.2d 1113 (2001). The mediation effort failed, and the case was returned to the court's active docket for decision on reconsideration.

On December 11, 2002, the Supreme Court of Ohio issued *DeRolph IV*, wherein it reiterated for the fourth time that "the current school-funding system is unconstitutional." *DeRolph IV* at 435 (App. 19a). The court vacated *DeRolph III* and declared *DeRolph I* and *II* as the law of the case. *Id.* The court's remedial order was comprehensive: "we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences." *Id.*

The Supreme Court of Ohio neither stayed the effective date of its *DeRolph IV* decision nor reserved ongoing jurisdiction over the case. On the same day as the decision, the court issued its judgment entry that Ohio's public school funding system is unconstitutional and issued a mandate commanding the trial court to carry the judgment into execution. (App. 47a-50a).

After December 11, 2002, the State continued the operation of Ohio's public schools under the same system of laws declared unconstitutional by the Supreme Court of Ohio in *DeRolph IV*. On March 4, 2003, the Petitioners filed a motion for compliance conference in the trial court. (App. 61a-79a). The purpose of the request for a conference was to ascertain when and how the State intended to comply with the Supreme Court of Ohio's *DeRolph IV* orders and the prior directives of the trial court. *Id.* The State responded by filing an original action in the Supreme Court of Ohio requesting a writ of prohibition to bar the trial court from entertaining Petitioners' motion. Petitioners moved to intervene in the prohibition action, which motion was granted. (App. 16a).

Petitioners also filed an answer to the State's complaint in the Supreme Court of Ohio asserting, among other defenses, that the order sought by the State would violate Petitioners' rights to due process of law as secured by the United States Constitution. (App. 58a). Petitioners thereby timely and properly raised federal constitutional questions at their first and only opportunity to respond to the writ of prohibition that is the subject of this petition for writ of certiorari. The federal constitutional questions were not expressly passed upon by the Supreme Court of Ohio.

On May 16, 2003, without further hearing, briefing, or argument, the Supreme Court of Ohio rendered its decision and entered a judgment granting the State's request for a writ of prohibition against the trial court. *Lewis* (App. 1a-15a).[4] The court stated that "we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State.*" *Id.*

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[4] Reference in this Petition to "*Lewis*" includes both that decision and the writ of prohibition issued in connection with it.

at 104 (App. 13a). The court thus not only prohibited the trial court from conducting the status conference sought by Petitioners but additionally foreclosed Petitioners from access to *any* of the courts of Ohio in connection with *DeRolph*. Petitioners here seek review of *Lewis*.

REASONS FOR GRANTING THE WRIT

Ohio's 1.8 million public school pupils receive their education under a system of school funding laws that has now been declared unconstitutional by the Supreme Court of Ohio on four separate occasions. The declarations of unconstitutionality, and the accompanying remedial orders, are sweeping in scope, portending changes that likely exceed in reach and significance anything ever before mandated by that court. Those remedial orders are now empty promises.

Six years ago, in its first decision in the case, the Supreme Court of Ohio acknowledged the vast implications of its undertaking:

> Today, Ohio stands at a crossroads. We must decide whether the promise of providing to our youth a free, public elementary and secondary education in a "thorough and efficient system" has been fulfilled. The importance of this case cannot be overestimated. It involves a wholesale constitutional attack on Ohio's system of funding public elementary and secondary education. Practically every Ohioan will be affected by our decision: the 1.8 million children in public schools and every taxpayer in the state. For the 1.8 million children involved, this case is about the opportunity to compete and succeed.

DeRolph I at 197. The remedial orders issued in *DeRolph I* and its progeny potentially reach every classroom, every teacher, and every student in the state. By rights, the *DeRolph* orders should alter forever the educational landscape in Ohio.

But in *Lewis*, the separate action here in issue, the Supreme Court of Ohio abruptly cut off Petitioners' access to Ohio's judicial system, invoked for the purpose of securing implementation of the remedial orders.

Lewis violates fundamental principles of federal constitutional law. The Due Process Clause of the Fourteenth Amendment does not permit *Lewis*' deprivation of the right of access to the courts, nor does it permit the consequent deprivation of the remedy ordered by the state's highest court for the declared violations of law. *Lewis* cannot be reconciled with historical traditions or notions of ordered liberty. Moreover, by depriving Petitioners of rights accorded all other litigants in Ohio, *Lewis* offends basic principles of equal protection.

Just as the momentous rulings in *DeRolph* were without parallel in Ohio, so, too, is *Lewis*' deprivation of the remedies decreed in that case. The breadth and manner of the deprivation wrought by *Lewis* call into question the continued vitality of the rule of law in Ohio and beyond.

I. THE SUPREME COURT OF OHIO HAS CONCLUSIVELY DETERMINED THAT PETITIONERS HAVE ENFORCEABLE RIGHTS TO EDUCATION UNDER THE OHIO CONSTITUTION, THAT THOSE RIGHTS ARE BEING VIOLATED, AND THAT PETITIONERS ARE ENTITLED TO RELIEF.

At the outset, and in order to clarify what is and is not in issue in this case, it may be helpful to identify the two distinct levels of this controversy. The first level concerns the educational entitlement of Ohio's school children pursuant to the Ohio Constitution. This is a matter of state law and has already been decided by the Supreme Court of Ohio in *DeRolph*.[5] As a result, it is now settled law that the education clauses of the Ohio Constitution are not merely aspirational; rather, they create substantive entitlements on the part of Ohio's children and corresponding enforceable obligations on the part of the State. It is also absolutely settled that the State has neglected its obligation and that the laws that presently compose the State's school funding system are unconstitutional. Finally, the Supreme Court of Ohio, having repeatedly declared both of the foregoing, has also issued a series of remedial orders directing comprehensive reform of the unconstitutional system. All of the aforementioned issues are settled matters of state law, and the instant petition does not require this Court to examine any of them independently.[6]

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[5] "*DeRolph*" is generally used herein to refer collectively to *DeRolph IV* and the two earlier decisions reinstated by *DeRolph IV* (*DeRolph I* and *DeRolph II*).

[6] Accordingly, this case does not require the application or reconsideration of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

The second level of this controversy stems from the unprecedented action of the Supreme Court of Ohio in *Lewis*, a decision that, with but a single stroke, aborted the *DeRolph* litigation prior to the Petitioners ever having achieved *any* remedy for the violations declared in *DeRolph IV*.[7] It is this second level of this controversy that brings Petitioners to this Court.

The Supreme Court of Ohio's action in *Lewis* is wholly without precedent under Ohio law, and it is a shocking affront to rights protected by the Due Process Clause of the federal constitution. When a final judgment declares that a party has been wronged and provides remedial orders, the prevailing party has an enforceable right to the remedy so ordered. The duty of the courts to require compliance with such orders (even when directed at the other branches of government) is firmly established as a fundamental imperative in both the federal and Ohio systems of jurisprudence.

Consistent with the foregoing, in *DeRolph I*, the Supreme Court of Ohio emphatically rejected the argument that a constitutional challenge to the State's school funding system presented a nonjusticiable political question. "We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable. We refuse to undermine our role as judicial arbiters and to

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[7] Although, as the State argued below, Petitioners could commence a *new* lawsuit aimed at vindicating educational rights, such a suit could not redress the ongoing deprivation of the remedy to which the school children are *presently* entitled, under *DeRolph IV*. Moreover, unless *Lewis* is reversed, a new suit could not yield anything more than Petitioners already have obtained – a comprehensive declaration of rights, with corresponding remedial orders, all of which are completely unenforceable.

pass our responsibilities onto the lap of the General Assembly." *DeRolph I* at 198. Thereafter, the court continued to issue remedial orders, and it expressly confirmed that a remedy for the constitutional violations repeatedly identified by the court would be enforced. *DeRolph II* at 12 ("[W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity.").

The Supreme Court of Ohio never wavered in *DeRolph* from its resolve that it not only had the power but the duty to require the State to reform the unconstitutional funding system. In its final *DeRolph* decision, the court vacated *DeRolph III*, which represented a constriction of its earlier, more comprehensive remedial decrees, and reinstated those earlier decrees as follows:

> [T]he General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

DeRolph IV at 435 (citations omitted) (App. 19a).[8]

The vigor with which the parties and the court (including dissenting justices) addressed *DeRolph* throughout the decade of that litigation evidenced their common understanding that *DeRolph* was not a mere academic exercise. All understood that the case would, at the end, have legal and practical consequences of unparalleled magnitude. Nothing in the history of Ohio jurisprudence, generally, or *DeRolph*, in particular, foreshadowed *Lewis*' sudden and anomalous divestment of the *rights already declared and the relief already ordered* in *DeRolph IV*.

II. *LEWIS*' EXTRAORDINARY PROHIBITION OF JUDICIAL INVOLVEMENT IN THE ENFORCEMENT OF *DEROLPH*'S REMEDIAL DECREES DEPRIVES OHIO'S 1.8 MILLION SCHOOL CHILDREN OF PARAMOUNT INTERESTS, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. *Lewis* Deprives Petitioners Of Their Right To Access Ohio's Courts.

The Due Process Clause of the federal constitution protects Petitioners' right to invoke the processes created by state law for the enforcement of remedial orders. *Lewis*'

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[8] *Lewis* did not modify the scope of *DeRolph IV* but in fact confirmed it. *Lewis* at 100 (App. 5a). In the five months separating *DeRolph IV* and *Lewis*, there were no statutory changes and no decisions of the Supreme Court of Ohio or the federal courts of relevance. The only change was in the composition of the Supreme Court of Ohio.

summary and arbitrary deprivation of this right cannot be reconciled with the Due Process Clause.

Under Ohio law, when a superior court issues remedial orders but declines to retain continuing jurisdiction, as the Supreme Court of Ohio did in *DeRolph IV*, the power to oversee enforcement of the remedy reverts to the trial court as a matter of course. Among the sources for such jurisdiction is Section 4, Article IV of the Ohio Constitution, which grants original jurisdiction to common pleas courts (i.e., trial courts) over "all justiciable matters . . . as may be provided by law." Additionally, Ohio's Declaratory Judgment Act specifically confers upon any court of record the power to grant further necessary or proper relief where, as here, a declaratory judgment has been entered. Ohio Rev. Code Ann. Chapter 2721; Ohio Rev. Code Ann. § 2721.09. Not surprisingly, the rules of procedure applicable to Ohio's trial courts include a counterpart to Fed. R. Civ. P. 70,[9] which has long been used by the federal courts to enforce a wide variety of judgments, including those mandating large-scale institutional reform.[10]

The mandate sent to the trial court following *DeRolph IV* (commanding the trial court to "proceed without delay to

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[9] Staff Notes to Ohio Rules of Civil Procedure 70 indicate that the wording of this rule is virtually identical to that of its federal counterpart. Ohio Rev. Code Ann., Rules of Court, Civil at 801 (West 1994).

[10] *See Morales Feliciano v. Hernandez Colon*, 771 F.Supp. 11, 12-13 (P.R. 1991) ("Rule 70 'gives the courts ample power to deal with parties who seek to thwart judgments by refusals to comply with orders to perform specific acts.' . . . The rule also has been relied upon by courts to effectuate judgments in public reform litigation.").

carry the [judgment] in this cause into execution" (App. 49a)), and Petitioners' subsequent motion to that court for a status conference (seeking only judicial oversight of the reform process), are consistent with the foregoing sources of Ohio law, as traditionally implemented by Ohio's judiciary. *Lewis*' obstruction of the enforcement of a validly rendered and presently effective judgment (and accompanying remedial orders) is a singular aberration.

This Court historically has recognized that the federal constitution protects access to the judicial processes established by the states. In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court noted that it "traditionally has held that the Due Process Clauses [of the Fifth and Fourteenth Amendments] protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. The protection emanates from the understanding that the Due Process Clause creates a constitutionally protected interest in access to a forum created by the state for such purposes. *See id.*[11]

This Court has indicated that whether or not access to the civil courts of the states is constitutionally protected depends upon the significance of the underlying interest sought to be adjudicated. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Here, the educational interests at stake are vital – both to the children who have been deprived of them and to the society

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[11] In addition to the Due Process Clause of the Fourteenth Amendment, the Court has derived the right of access to the courts from a variety of other constitutional provisions, including the Article IV Privileges and Immunities Clause, and the First, Fifth, and Fourteenth Amendments. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

those children ultimately must sustain. As the Court recently observed, "We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter v Bollinger*, 123 S.Ct. 2325, 2340 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). *Accord Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments."). Similarly, in 1974 the United States Congress declared education to be a matter of national interest:

> Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers.

20 U.S.C. § 1221-1.

The constitutional significance of the right to public education was underscored in *Goss v. Lopez*, 419 U.S. 565 (1975), in which this Court found that depriving a single student of ten days of education was sufficiently consequential to require the protections of due process. How, then, can *Lewis* constitutionally deny Petitioners access to the judicial processes of the state, which processes offer the only means by which Petitioners may vindicate educational rights of countless students who otherwise must continue *into a second decade* to suffer educational deprivation of declared constitutional proportions?

By prohibiting Ohio's courts from the exercise of the jurisdiction they would otherwise use to enforce declared educational rights, *Lewis* has inflicted a deprivation of paramount interests, in violation of the federal constitution.[12]

B. The Right To A Previously Ordered Remedy Has Historically Been Protected By The Federal Courts And Is Implicit In The Concept Of Ordered Liberty.

Lewis' denial of Petitioners' federally-protected right of access to Ohio's courts works a complete deprivation of the remedy to which *DeRolph IV* entitles Petitioners. That deprivation of a remedy is itself an independent violation of rights protected by the federal constitution.

The federal courts historically have recognized, as an essential and fundamental underpinning of our legal system, the rights of successful litigants to rely upon, obtain the benefits of, and compel compliance with, the judgments awarded them. When *Lewis* closed the courthouse doors to Petitioners, it deprived them of these rights, stripping *DeRolph IV* of any practical effect and Ohio's school children of legally protected rights, as already adjudicated, in violation of substantive as well as procedural due process.

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[12] *Cf. Barry v. Barchi*, 443 U.S. 55 (1979) (protected interest in horse trainer's license); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (protected interest in utility service); *Bell v. Burson*, 402 U.S. 535 (1971) (protected interest in driver's license).

Although members of the Court have at times urged varying approaches to substantive due process, the Court generally requires, as an initial matter, that the interests asserted to merit such protection be described with care and specificity; the Court has then examined such interests to determine whether they are both "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" and "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997); *see also Chavez v. Martinez*, 123 S.Ct. 1994 (2003) (Thomas, J., concurring).

Applying the foregoing to the instant case, Petitioners' interest in securing, through customary state processes, the remedy granted them by *DeRolph IV* – and blocked by *Lewis* – unquestionably qualifies for the protections of substantive due process. Beginning, as *Glucksberg* counsels, with a careful description of the interest asserted, it is critical that Petitioners' interest is not a mere abstract "right to a remedy" but a right to the particular remedy *already ordered* by the highest court of Ohio.

The specific characteristics of the interests denied by *Lewis* are compelling. In substantive terms, the interests concern the educational rights of millions of current and future school children. The entitlement denied them is created by the Ohio Constitution, the supreme law of Ohio. The inadequacies in the school funding laws are so pervasive that the Supreme Court of Ohio has declared those laws "inherently incapable of achieving their constitutional purpose." *DeRolph I* at 212. The continued operation of these laws exposes children to physical danger as well as to the lifelong consequences of educational neglect, impoverishing them physically, intellectually, and economically. This deprivation not only condemns them to

lives of diminished potential, but it also negatively affects the welfare of the entire state and nation.

In procedural terms, the Supreme Court of Ohio has recognized and declared all of the foregoing. It has acknowledged its duty to provide a remedy and its authority to enforce its orders. It has repeatedly issued remedial orders requiring comprehensive reform and providing specific direction regarding the nature of the reform.[13] There has been no compliance whatever with *DeRolph IV*, and the harm to Ohio's children is ongoing.

It is in this specific context that Petitioners assert that the fruits of *DeRolph* are protected by procedural and substantive due process. The idea that a party may litigate rights of this magnitude for a decade, repeatedly emerge the victor, be the beneficiary of remedial orders issued by the highest court of the state, and then summarily be barred from enforcing the judgment in its favor is wholly inconsistent with notions of ordered liberty and the rule of law.

The entitlement to a remedy for a legal wrong in circumstances such as these is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 702. As early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), this Court recognized that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded'" unless, as in *Marbury*, the courts lack jurisdiction over the dispute, which clearly is not the case here. *Id.* (quoting 3 William Blackstone, Commentaries *23). The Supreme Court of Ohio has expressly and forcefully

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[13] *See supra* footnotes 2 and 3, and *DeRolph IV* at 435.

recognized that the *DeRolph* dispute is within the jurisdiction, and subject to the remedial powers, of the courts.

In cases involving interests far less vital than those asserted here, and affecting far fewer people, this Court has evaluated remedies according to the Due Process Clause.[14] In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), for example, the Court found prospective relief alone inadequate to vindicate rights violated by a state tax law. By comparison, in this case (in which retrospective relief has never been sought), *Lewis* operates to perpetuate ongoing educational deprivation on a statewide scale, eliminating any consequences for the violators and foreclosing *any* means of relief for the victims. Absent the intervention of this Court, *Lewis*' deprivation of Petitioners' federally protected right to a remedy for the violations of legal rights declared in *DeRolph IV* is complete.[15]

Moreover, *Lewis'* sudden and extraordinary prohibition of the enforcement of remedies earlier and repeatedly ordered is reminiscent of the "bait-and-switch" scheme condemned by

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[14] Even a legal claim not yet reduced to judgment has been accorded protection as a property interest. *Logan*, 455 U.S. at 428-29 (holding that a cause of action is a protected property interest); *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 804 (1996) (describing a chose in action as "a protected property interest in its own right").

[15] *Cf. Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.").

this Court as violative of due process in *Reich v. Collins*, 513 U.S. 106 (1994).[16] Here, Petitioners litigated *DeRolph* for an additional six years after the Supreme Court of Ohio first declared, in *DeRolph I*, that constitutional rights to education were justiciable and enforceable, and issued the first in a series of remedial orders. Subsequent proceedings were in reliance upon the consequent expectation of an enforceable remedy at the conclusion of the liability phase of the *DeRolph* litigation.

Neither the systemic nature of *DeRolph*'s remedial orders nor the refusal of the State to comply with them is a compelling reason to divest the school children of their entitlement to a remedy. This Court has unequivocally rejected the notion that a state or local government may refuse to comply with judicially ordered remedies.[17] In the school desegregation cases, faced with the same kind of institutional intransigence (and with similar interests at stake), this Court approved the exercise of judicial authority to compel

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[16] "[D]ue process requires a 'clear and certain' remedy for taxes collected in violation of federal law. A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do, and what Georgia did here, is hold out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." *Reich* at 108 (citations omitted); *see also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

[17] While the cases referenced in support of this proposition concern federal court enforcement of federal court orders, the principles underlying the cases apply with equal force in the context of state courts, likewise requiring those courts to act to enforce their own remedial decrees.

compliance with remedial decrees. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 15 (1971) ("If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").[18] Moreover, the remedial authority of the judiciary takes on heightened importance where, as here, there are *ongoing* violations of declared rights. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978).

Remedial decrees impose significant obligations on those to whom they are directed. In the desegregation cases, faced with requests for the dissolution of remedial decrees and the withdrawal of judicial supervision after decades of reform efforts by formerly segregated school systems, this Court has indicated that there must first be a showing of good faith compliance with the decrees for a period of time sufficient to eliminate the "vestiges of past discrimination . . . to the extent practicable." *Board of Ed. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 250 (1991); *see also Freeman v. Pitts*, 503 U.S. 467 (1992). By comparison, in the instant case there has never been *any* compliance with *DeRolph IV*, and the constitutional violations for which Petitioners seek a remedy are *present* ones. The issue is not whether a remedy thus far provided is sufficient; no remedy of any kind has ever been provided in response to *DeRolph IV*. Indeed, at the time *Lewis* was issued, a mere five months after *DeRolph IV*, the State was brazenly continuing, as it still does, to operate the

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[18] This Court has even acknowledged the power of the judiciary to order that taxes be levied when necessary to remedy adjudicated wrongs. *Missouri v. Jenkins*, 495 U.S. 33, 55 (1990).

very same school funding system that had *four times* been declared unconstitutional.

The question thus presented to this Court is not one of degree. Instead, the question is whether litigants may, consistent with procedural and substantive due process, be cut off from *any remedy whatsoever* for ongoing wrongs that have already been judicially declared and accompanied by remedial orders. The Due Process Clause is implicated not simply because the State has refused to comply with *DeRolph IV*, but because *Lewis* flatly held that litigants may be barred from applying to the courts to secure the enforcement of binding judicial decrees.

Lewis stands "ordered liberty" on its head, enabling Ohio's legislative and executive branches to continue to knowingly violate the law while affirmatively *prohibiting* Ohio's courts from enforcing compliance with the law. The lawless methodology of *Lewis*, the unconstitutional harm it knowingly inflicts on a powerless and dependent class of victims, and the fact that *Lewis* emanates from the highest level of the very branch of state government most charged with, and relied upon for, the protection of such victims is beyond understanding or excuse.[19]

Finally, in addition to analyzing substantive due process claims in terms of historical notions of ordered liberty, this

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[19] *See United States v. Wallace*, 218 F. Supp. 290, 292 (N.D. Ala. 1963) ("In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.").

Court at times has evaluated challenged state action in terms of a "shocks the conscience" standard. *See generally Chavez*, 123 S.Ct. 1994. In this regard, if *Lewis* is not "conscience shocking," it is difficult to conceive of any governmental conduct that would merit such description. While this Court has variously employed – and sometimes questioned, as lacking clear parameters – both the shocks-the-conscience and implicit-in-ordered-liberty approaches to substantive due process (*see generally id.*; *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998)), this is not a case that tests the outer limits of either approach. However analyzed, the manner and impact of the deprivation wrought by *Lewis* violate the Due Process Clause.

C. *Lewis'* Unprecedented Deprivation Of The Right To Enforce Remedial Decrees Is A Violation Of Equal Protection.

This Court has recognized that when a state creates a judicial process, it may not grant the benefits of that process to some litigants and deny it to others without implicating the often-intertwined issues of equal protection and due process. *See generally M.L.B. v. S.L.J.*, 519 U.S. at 120 ("[T]he Court's decisions concerning access to judicial processes, commencing with *Griffin* and running through *Mayer*, reflect both equal protection and due process concerns."); *Griffin v. Illinois*, 351 U.S. 12 (1956), *construed in Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating

the Equal Protection Clause."); *see also Boddie v. Connecticut*, 401 U.S. 371, 377 (1971).[20]

Ohio law historically and routinely grants *all* litigants the right to seek the aid of its courts in the enforcement of judgments. *Lewis* singles out one group of claimants – those seeking enforcement of the educational clauses of the Ohio Constitution, as declared and ordered in *DeRolph* – denying them and them alone access to the judicial processes historically available to all others. *Lewis* not only lacks a compelling state interest, it lacks any proper purpose whatever. As this Court has stated in another context, "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996).[21]

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[20] Concerning the relationship between due process and equal protection generally, *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.").

[21] *Cf.*, *Primes v. Tyler*, 43 Ohio St.2d 195, 205, 331 N.E.2d 723, 729 (1975) (striking down Ohio's "guest statute" on the grounds that the statute "by its grant of a special privilege and immunity to negligent drivers who injure nonpaying passengers is . . . violative of the Fourteenth Amendment to the United States Constitution, in that it denies due process of law and equal protection of the laws to the people of this state.").

Lewis deliberately and selectively excluded Ohio's most vulnerable citizens from the judicial processes available under state law to all others. In so doing, *Lewis* denied the school children the rights afforded them by Ohio's most basic law, depriving them of the education this Court has described as "pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter*, 123 S.Ct. at 2340. *Lewis* is not only morally unconscionable. It also violates the fundamental promises of due process and equal protection contained in the United States Constitution.

In sum, Petitioners respectfully submit that this Court should accept review of this case in order to address significant issues of federal constitutional law, including procedural and substantive due process and equal protection of law. *Lewis* raises significant issues concerning the traditional procedural due process entitlements of litigants who seek access to the courts to vindicate important substantive rights. It also raises a broader issue of whether, consistent with substantive due process, litigants who have already established their substantive rights (and acquired remedial orders) may be denied all access to the courts, even when the courts clearly have jurisdiction to provide and enforce a remedy for the ongoing violations of such rights. Finally, *Lewis* offers an opportunity for the Court to address the important equal protection issues raised by *Lewis*' differential treatment of the school children of Ohio as compared with all other litigants in Ohio.

III. REVIEW IS WARRANTED BY THE IMPORTANT INTERESTS AT STAKE.

This Court has long recognized that public education serves the essential purpose of preparing a citizenry capable

of continuing our democracy. *See Brown v. Board of Educ.*, 347 U.S. 483. Moreover, the importance of education has grown as our nation has evolved from the industrial revolution to the information age. The demands of economic productivity and basic citizenship are increasingly complex, placing heightened demands upon our public schools.[22]

In *Grutter*, this Court approved race-based law school admissions criteria, while noting that hoped-for improvements in pre-college educational opportunities would foretell the day when such considerations would no longer be necessary.[23] Yet *Lewis* perpetuates the very disparities underlying *Grutter*'s compensatory criteria – at least for those in Ohio's flawed public schools.

This Court is no stranger to the problems of these schools. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court was given a ringside view of the deplorable conditions

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[22] Thirty years ago, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, this Court held that education is not a fundamental right for purposes of federal equal protection analysis. As noted *supra* footnote 6, the instant case does not require a re-examination of *Rodriguez*. Nevertheless, this Court may view this case as an opportunity to reconsider the fundamentality of education in a context in which children are routinely deprived of such rights and in light of the heightened contemporary importance of those rights.

[23] "As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." *Grutter*, 123 S.Ct. at 2364 (Ginsburg, J., concurring).

in the Cleveland City School District, Ohio's largest. The educational deprivation portrayed in *Zelman* persists, and it continues to inflict its greatest harms on those with the greatest needs, for whom public education is meant to open doors – not shut them forever. The words of Justice Thomas echo in depressed schools throughout Ohio. "[T]he promise of public school education has failed poor inner-city blacks. While in theory providing education to everyone, the quality of public schools varies significantly across districts." *Id.* at 682. *Zelman*'s voucher program may offer escape for a few, but the vast majority of Cleveland's students continue to attend the same underfunded, failing schools condemned by the State, itself, in *Zelman*. Moreover, while *Zelman* revealed educational deprivation in Cleveland, *DeRolph* constitutes a far more comprehensive indictment of public education throughout the State of Ohio.

Remedies for systemic violations of constitutional rights by governmental agencies may be complex, time consuming, and at times unpopular, but the notion of denying any remedy whatsoever has never been tolerated. Had this Court in *Brown v. Board of Education* declared the rights of school children to attend integrated schools but deprived them of the ability to enforce that decree, there can be little doubt that segregation would have continued for decades – and perhaps forever. No less than the children in *Brown*, Ohio's children are entitled to a remedy.

There is yet a broader issue presented by this case. At the present time, numerous other states are engaged in school

funding litigation.[24] In some of those states, the legislatures have demonstrated the same unwillingness to institute court-ordered reforms as has been demonstrated in Ohio. If *Lewis* becomes the model for the nation, the formula for back-door evisceration of legal rights will be clear – recognize the constitutional right but deny judicial enforcement of a remedy for violations of those rights. Legal protections will effectively be eliminated – not by any change in the law itself but by the absence of any enforceable remedy for its violation.

While the consequences of *Lewis* are enormous when measured in the context of school funding suits, even this does not represent the full extent of the damage caused by *Lewis*. The gaping hole *Lewis* creates in the fabric of due process potentially endangers *any* fundamental right, not just those concerned with education. When basic rights are so easily denied, the rule of law has ceased to exist.

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[24] *See* Advocacy Center for Children's Educational Success with Standards (visited Aug. 12, 2003) <http://www.accessednetwork.org/states/index.htm> for the status of school funding litigation in the 50 states.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO

No. 2003-0447

Submitted April 15, 2003
Decided May 16, 2003

THE STATE EX REL.	)
STATE OF OHIO	)
	)
v.	)
	)
LEWIS, JUDGE, ET AL.	)
	)

Prohibition — Writ sought prohibiting Perry County Common Pleas Court Judge Linton D. Lewis Jr. from exercising further jurisdiction in DeRolph v. State — Writ granted.

IN PROHIBITION.

LUNDBERG STRATTON, J.

The *DeRolph* Litigation: *DeRolph I, II, III,* and IV

{¶1} In December 1991, Dale R. DeRolph and other plaintiffs, including five school district boards of education, filed a complaint in respondent Perry County Court of Common Pleas. In an amended complaint, the *DeRolph*

plaintiffs requested (1) a declaration that public education is a fundamental constitutional right in Ohio, (2) a declaration that the system of funding public education in Ohio was unconstitutional as applied to plaintiffs and others, and (3) a mandatory injunction requiring relator, the state of Ohio, to provide for a system of funding public elementary and secondary education in compliance with the Ohio Constitution. The *DeRolph* plaintiffs further requested that the common pleas court "retain jurisdiction of this matter for the purpose of assuring compliance with its lawful findings and orders." Relator, the state of Ohio, the State Board of Education, the State Superintendent of Public Instruction, and the State Department of Education were named as defendants.

{¶2} Respondent Perry County Common Pleas Court Judge Linton D. Lewis Jr. determined that Ohio's school-funding system violated the Ohio Constitution and ordered the preparation of legislative proposals for submission to the General Assembly to eliminate wealth-based disparities among Ohio public school districts. See *DeRolph v. State* (1997), 78 Ohio St.3d 193, 194, 677 N.E.2d 733. ("DeRolph I.") After the court of appeals reversed the trial court's judgment, see *DeRolph v. State* (Aug. 30, 1995), Perry App. No. CA-477, 1995 WL 557316, we reversed the judgment of the court of appeals. *DeRolph I at* 213, 677 N.E.2d 733.

{¶3} In *DeRolph I*, we held that "Ohio's elementary and secondary public school financing system violates Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state." Id. at syllabus. We refused, however, "to encroach upon the clearly legislative function of deciding what the new legislation will be." *DeRolph I*, 78 Ohio St.3d

at 213, 677 N.E.2d 733, fn. 9. Instead, we ordered the General Assembly to create an entirely new school-financing system, but stayed the effect of the decision for 12 months. Id. at 213, 677 N.E.2d 733. We remanded the cause to the common pleas court "with directions to enter judgment consistent with this opinion" and ordered that court to "retain jurisdiction until the legislation is enacted and in effect, taking such action as may be necessary to ensure conformity with this opinion." Id. We conferred plenary jurisdiction on the trial court to enforce the decision, including the right to petition this court for guidance. Id. at fn. 10.

{¶4} We subsequently clarified *DeRolph I* by stating that Judge Lewis would rule on the constitutionality of the final legislative remedy and that any party could then appeal directly to this court. *DeRolph v. State* (1997), 78 Ohio St.3d 419, 421, 678 N.E.2d 886. We further rejected any supervision of the legislative process by the courts.

{¶5} "Given the separate powers entrusted to the three coordinate branches of government, both this court and the trial court recognize that it is not the function of the judiciary to supervise or participate in the legislative and executive process. * * *

{¶6} " * * * [I]t is the role of the courts, pursuant to the Ohio Constitution, to determine the constitutional validity of the system of funding and maintaining the public schools in Ohio." Id. at 420-421, 678 N.E.2d 886.

{¶7} On remand, the *DeRolph* plaintiffs asked Judge Lewis to order the *DeRolph* defendants to follow three steps pursuant to a schedule recommended by the plaintiffs. See

DeRolph v. State (1997), 79 Ohio St.3d 297, 681 N.E.2d 424. After Judge Lewis petitioned this court for guidance on the plaintiffs' motion, we held that the *DeRolph* plaintiffs' request for the order should be denied. Id.

{¶8} In February 1999, Judge Lewis entered his judgment on the remanded case. *DeRolph v. State* (1999), 98 Ohio Misc.2d 1, 712 N.E.2d 125. Judge Lewis held that the state had not proved that its remedy complied with the court's *DeRolph I* mandate and that the school-funding system remained unconstitutional. Id. at 263, 712 N.E.2d 125. Judge Lewis retained jurisdiction to ensure compliance and ordered the State Superintendent of Public Instruction and the State Board of Education to prepare a report with proposals to comply with the orders of the common pleas court and this court, to submit the completed report to the General Assembly, and thereafter to prepare a report setting forth the steps taken to resolve the issues raised by the *DeRolph* litigation. Id. Judge Lewis's remedial order was stayed pending appeal. *DeRolph v. State* (1999), 85 Ohio St.3d 1488, 709 N.E.2d 1215.

{¶9} On appeal, we agreed that the revised school-funding system was still unconstitutional but gave the defendants more time to comply with Section 2, Article VI of the Ohio Constitution. *DeRolph v. State* (2000), 89 Ohio St.3d 1, 36-38, 728 N.E.2d 993 ("*DeRolph II*"). In so holding, however, we did not adopt Judge Lewis's 1999 remedial order. In addition, we "decline[d] to appoint a special master to oversee the state's further efforts to comply with Section 2, Article VI" and maintained continuing jurisdiction. We affirmed only those portions of the trial court's judgment that were consistent with *DeRolph II*. Id.

{¶10} In September 2001, after the state further modified the school-funding system, we ordered the state to implement certain changes that would satisfy the tests for constitutionality in *DeRolph I* and *II*. *DeRolph v. State* (2001), 93 Ohio St.3d 309, 325, 754 N.E.2d 1184 ("*DeRolph III*") We further stated that there was "no reason to retain jurisdiction" and that "[i]f the order receives less than full compliance, interested parties have remedies available to them." Id.

{¶11} On reconsideration, we vacated *DeRolph III*, held that *DeRolph I* and *II* were the law of the case, and further held that the school-funding system was unconstitutional. *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529 ("*DeRolph IV*"). We directed the General Assembly "to enact a school-financing scheme that is thorough and efficient, as explained in *DeRolph I, DeRolph II*, and the accompanying concurrences." Id. at ¶ 5. In the *DeRolph IV* mandate, we ordered the common pleas court "to carry the following judgment in this cause into execution":

{¶12} "IT IS ORDERED by the court that, consistent with the opinion rendered herein, 2002-Ohio-6750, [97 Ohio St.3d 434, 780 N.E.2d 529], the decision entered in this case on September 6, 2001, be, and hereby is, vacated and that this court's decisions in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, and *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993, are the law of the case and that the current school-funding system is unconstitutional." *DeRolph v. State*, 97 Ohio St.3d 1477, 2002-Ohio-6750, 780 N.E.2d 282.

Motion for Compliance Conference

{¶13} On March 4, 2003, the *DeRolph* plaintiffs moved the trial court to schedule and conduct a conference to address the defendants' compliance with the orders of the common pleas court and this court. The *DeRolph* plaintiffs also requested that, consistent with the trial court's 1999 remedial order, the defendants be ordered to prepare a report setting forth proposals to comply with the court's judgment. In their motion, the *DeRolph* plaintiffs asked the common pleas court to schedule "a compliance conference at the earliest possible time, in order to ensure that the State initiates, without further delay, the process of formulating a school funding system that satisfies the mandates of the Supreme Court."

DeRolph V

{¶14} Three days later, on March 7, 2003, the state filed this action for a writ of prohibition preventing respondents, Judge Lewis and the common pleas court, from exercising further jurisdiction in *DeRolph*. The state also moved for an emergency stay of proceedings pending resolution of the state's request for a writ of prohibition. On March 10, 2003, the *DeRolph* plaintiffs and the Ohio Coalition for Equity & Adequacy of School Funding moved to intervene as additional respondents. On March 12, the state filed a memorandum opposing the motion to intervene. On March 17, Judge Lewis responded to the state's emergency motion for a stay by citing the *DeRolph I* grant of authority to him to petition this court for guidance and stating that since "this case continues in uncharted waters, this Court hereby seeks guidance as to the proper course to follow in the case at bar."

{¶15} On March 26, respondents Judge Lewis and the common pleas court filed a response to the complaint in which they reiterated that they seek guidance from us "as to the proper course to follow in the case at bar." On April 3, we denied the state's motion for an emergency stay and granted the motion to intervene. *State ex rel. State v. Lewis*, 98 Ohio St.3d 1509, 2003-Ohio-1572, 786 N.E.2d 60.

{¶16} The cause is now before the court under S.Ct.Prac.R. X(5) for our determination whether to dismiss the complaint or grant a peremptory or alternative writ.

Prohibition

{¶17} The state seeks a writ of prohibition to prevent Judge Lewis and the common pleas court from exercising further jurisdiction in *DeRolph*. In order to be entitled to the requested writ, the state must establish that (1) Judge Lewis and the common pleas court are about to exercise judicial or quasi-judicial power, (2) the exercise of that power is not authorized by law, and (3) denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. *State ex rel. Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas,* 97 Ohio St.3d 69, 2002-Ohio-5312, 776 N.E. 2d 92, ¶ 14.

{¶18} In cases of a patent and unambiguous lack of jurisdiction, the requirement of a lack of an adequate remedy of law need not be proven because the availability of alternate remedies like appeal would be immaterial. See, e.g., *State ex rel. Goldberg v. Mahoning Cty. Probate Court* (2001), 93 Ohio St.3d 160, 162, 753 N.E.2d 192.

{¶19} Conversely, "[i]n the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction and a party challenging that jurisdiction has an adequate remedy by appeal." *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522, ¶ 18.

{¶20} Therefore, the dispositive issue is whether Judge Lewis and the common pleas court *patently and unambiguously* lack jurisdiction over the *DeRolph* plaintiffs' motion for a compliance conference. For the following reasons, we grant a peremptory writ of prohibition. We hold that the exercise of further jurisdiction in this litigation would violate our *DeRolph IV* mandate.

The Trial Court's 1999 Remedial Order

{¶21} The *DeRolph* plaintiffs asserted two grounds in their motion for a compliance conference to support the continuing exercise of jurisdiction by the trial court in *DeRolph*: (1) the trial court's 1999 remedial order and (2) our mandate in *DeRolph IV*.

{¶22} The trial court's 1999 remedial order is inconsistent with *DeRolph II* and our various rulings during the *DeRolph* litigation. Instead of affirming the trial court's remedy of ordering the State Superintendent of Public Instruction and the State Board of Education to prepare reports containing proposals to comply with *DeRolph I* and *II*, we ordered a different remedy: granting the state additional time to comply with the Ohio Constitution and maintaining continuing jurisdiction over the case. *DeRolph II*, 89 Ohio St.3d at 36-38, 728 N.E.2d 993. Notably, we expressly denied

comparable relief in *DeRolph II* by declining to appoint a special master to oversee the state's efforts to comply with Section 2, Article VI. Id., 89 Ohio St.3d at 38, 728 N.E.2d 993. Because the trial court's 1999 remedial order was inconsistent with our holding in *DeRolph II*,[1] that order was reversed and retains no validity.

{¶23} Moreover, by repeatedly denying the *DeRolph* plaintiffs' requests for comparable remedial relief throughout this litigation, we intended to preclude this relief. *DeRolph*, 79 Ohio St.3d 297, 681 N.E.2d 424 (ordering court to deny *DeRolph* plaintiffs' motion to follow schedule to comply with *DeRolph I*); *DeRolph*, 85 Ohio St.3d 1488, 709 N.E.2d 1215 (staying trial court's 1999 remedial order pending appeal); *DeRolph v. State* (2001), 91 Ohio St.3d 1225, 741 N.E.2d 533 (declining to grant *DeRolph* plaintiffs' motion for an order requiring defendants to "file a master plan, and to file subsequent progress reports").

{¶24} Therefore, the trial court's 1999 remedial order did not survive our decision in *DeRolph II* and provides no support for any exercise of jurisdiction by the trial court over the *DeRolph* plaintiffs' motion for a compliance conference.

Mandate

{¶25} The remaining basis claimed by the *DeRolph* plaintiffs for authorizing continued jurisdiction by the trial court to

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[1] We affirmed "those portions of the trial court decision that are consistent with the foregoing opinion." *DeRolph II*, 89 Ohio St.3d at 38, 728 N.E.2d 993.

consider their motion for a compliance conference is that this exercise of jurisdiction is contemplated, and in fact required, by our mandate in *DeRolph IV*. Conversely, the state asserts that a writ of prohibition is warranted because any further exercise of jurisdiction by the trial court would violate the *DeRolph IV* mandate.

{¶26} As the parties agree, a writ of prohibition is appropriate to require lower courts to comply with the mandate of a superior court. *Berthelot v. Dezso* (1999), 86 Ohio St.3d 257, 259, 714 N.E.2d 888. Extraordinary relief in prohibition is appropriate under these circumstances because the Ohio Constitution does not confer jurisdiction on courts of common pleas to review mandates of superior courts. *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna* (1995), 73 Ohio St.3d 180, 182, 652 N.E.2d 742.

{¶27} Because we issued the *DeRolph IV* mandate that the plaintiffs seek to enforce, this court is in the best position to determine whether Judge Lewis's exercise of jurisdiction over the *DeRolph* plaintiffs' motion for a compliance conference would be contrary to that mandate. See *State ex rel. Borden v. Hendon*, 96 Ohio St.3d 64, 2002-Ohio-3525, 771 N.E.2d 247, ¶ 9, quoting *State ex rel. Bitter v. Missig* (1995), 72 Ohio St.3d 249, 252, 648 N.E.2d 1355 (" 'The court that issued the order sought to be enforced is in the best position to determine [whether] that order has been disobeyed' ").

{¶28} We crafted our language in the *DeRolph IV* mandate to order that the trial court "carry this judgment into execution." 97 Ohio St.3d 1477, 2002-Ohio-6750, 780 N.E.2d 282. We *did not* remand the cause for *further proceedings*. See R.C. 2505.39 ("A court that reverses or

affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but *shall send a special mandate to the lower court for execution or further proceedings*" [emphasis added]). In fact, if we had intended a remand for further proceedings in this litigation, we would have expressly provided for that action. See *DeRolph I*, 78 Ohio St.3d at 213, 677 N.E.2d 733. By contrast, we did not specify any remand in *DeRolph IV*.

{¶29} Moreover, despite their disclaimer to the contrary, the *DeRolph* plaintiffs are requesting continuing judicial oversight of the preparation of the final legislative remedy. For example, in their memorandum in support of their motion for a compliance conference, the *DeRolph* plaintiffs request that Judge Lewis "conven[e] a conference and requir[e] the State to advise * * * *when and how it intends to comply with DeRolph IV and the 1999 [remedial] orders.*" (Emphasis added.)

{¶30} The *DeRolph* plaintiffs' request is nothing more than an ill-disguised attempt to require judicial approval for proposed remedies *even before those remedies are enacted*, i.e., requesting advisory rulings on the constitutionality of legislation that has not yet been passed.

{¶31} This, however, would constitute an unquestioned violation of the *DeRolph I, II,* and *IV* mandates. See, e.g., *DeRolph I*, 78 Ohio St.3d at 213, 677 N.E.2d 733, fn. 9 ("we recognize that the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the clearly legislative function of deciding what the new legislation will be"); *DeRolph II*, 89 Ohio St.3d at 12, 728 N.E.2d 993 ("it is for

the General Assembly to legislate a remedy"). It also constitutes an inappropriate request for an advisory opinion. Cf. *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176, 25 OBR 243, 495 N.E.2d 904, syllabus ("it is well-settled that this court will not indulge in advisory opinions"). In addition, as previously discussed, because the trial court's 1999 remedial orders were not affirmed by this court in *DeRolph II*, these orders are no longer valid.

{¶32} Furthermore, as the state cogently observes, a review of the various opinions in *DeRolph IV* supports our construction that no further jurisdiction over that particular case would be exercised, whether by this *or any other court*. See, e.g., *DeRolph IV*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529, ¶ 16 (Resnick, J., concurring) ("it does seem likely that further litigation will be forthcoming in the area of school funding, even though it apparently will be under a name other than *DeRolph*"); id. at ¶ 28 (Lundberg Stratton, J., concurring in part and dissenting in part) ("it is proper for the majority to dismiss the case once it has reached a finding of unconstitutionality"); id. at ¶ 37 (Moyer, C.J., dissenting) ("[the majority] implicitly declares this case concluded, yet does so without fully disposing of the issues that have developed during the litigation"); id. at ¶ 73 (Cook, J., dissenting) ("For the reasons I have expressed throughout this court's consideration of this cause, the court should dismiss this case"). Nor does the plurality opinion in *DeRolph IV* suggest any continued retention of jurisdiction by this court or the trial court.

{¶33} Therefore, our *DeRolph IV* mandate forbids Judge Lewis and the common pleas court to exercise further jurisdiction in this matter. We never held in *DeRolph II* or *IV*

that Judge Lewis's 1999 remedial order or, for that matter, the *DeRolph* plaintiffs' mandatory-injunction claim would be revived when we relinquished our jurisdiction. The duty now lies with the General Assembly to remedy an educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional.

{¶34} Accordingly, because it is beyond doubt that Judge Lewis and the common pleas court patently and unambiguously lack jurisdiction over any post-*DeRolph IV* proceedings, we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State*. See, e.g., *State ex rel. Kim v. Wachenschwanz* (2001), 93 Ohio St.3d 586, 588, 757 N.E.2d 367. In so holding, we abide by the usual practice that when a court declares a legislative act to be unconstitutional, that court generally does not remand the case with an order to retain jurisdiction over the constitutionality of new legislation enacted in response to its declaration. See, e.g., *DeRolph IV*, 97 Ohio St.3d 434, 2002-Ohio-6750, 780 N.E.2d 529, ¶ 16 (Resnick, J., concurring) ("In the normal case, when this court finds a particular statute or series of statutes unconstitutional, there is no thought given to retaining jurisdiction * * *"); *DeRolph*, 78 Ohio St.3d at 422, 678 N.E.2d 886 (Moyer, C.J., concurring in part and dissenting in part) ("Typically, when a Supreme Court declares a legislative act to be unconstitutional it does not order the legislative body to enact new legislation. Nor does it remand the case to a trial court with an order to retain jurisdiction over the consequent act of the legislative authority, including jurisdiction to rule upon the constitutionality of the new legislation"); id. at 423, 678 N.E.2d 886 (Lundberg Stratton, J., concurring in part and dissenting in part) ("the judiciary's role in this matter is complete and * * *, as with all other

legislation declared unconstitutional by this court, we must await new challenges to the new legislation").[2]

{¶35} Therefore, we grant the peremptory writ of prohibition and order Judge Lewis to dismiss the motion now pending before his court.

Writ granted.

PFEIFER, J., concurs.

MOYER, C.J., COOK and O'CONNOR, JJ., concur in judgment only.

RESNICK and F.E. SWEENEY, JJ., dissent.

Jim Petro, Attorney General, Roger F. Carroll, James G. Tassie and Sharon A. Jennings, Assistant Attorneys General, for relator.

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[2] Other state supreme courts have similarly refused to retain jurisdiction after declaring school-funding legislation unconstitutional. See, e.g., *Lake View School Dist. No. 25 of Phillips Cty. v. Huckabee* (2002), 351 Ark. 31, 91 S.W.2d 474, 511 ("It is not this court's intention to monitor or superintend the public schools of this state. Nevertheless, should constitutional dictates not be followed, as interpreted by this court, we will have no hesitancy in reviewing the constitutionality of the state's school-funding system once again in an appropriate case"); *Hull v. Albrecht* (1998), 192 Ariz. 34, 960 P.2d 634; *Helena Elementary School Dist. No. 1 v. State* (236 Mont. 44, 61, 1990), 784 P.2d 412 ("We decline to retain jurisdiction in this matter. The legislative changes in 1989 and 1991 will require new and different proof on the part of any parties challenging the same. We conclude that should such action be necessary, it can be presented in a new and separate court action").

Stephen R. Herendeen, Perry County Assistant Prosecuting Attorney, for respondents.

Bricker & Eckler, L.L.P., Nicholas J. Pittner, John F. Birath Jr., Sue W. Yount, Quintin F. Lindsmith and Susan B. Greenberger, for intervening respondents.

APPENDIX B

The Supreme Court of Ohio

CASE ANNOUNCEMENTS
AND ADMINISTRATIVE ACTIONS

April 2, 2003

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MOTION AND PROCEDURAL RULINGS

2003-0447. State ex rel. State v. Lewis.
In Prohibition. On emergency motion for stay of any proceedings in *DeRolph v. State*, Perry County Common Pleas Court case No. 22043. Motion denied.

On motion for leave to intervene of the *DeRolph* plaintiffs and the Ohio Coalition for Equity and Adequacy of School Funding. Motion granted.

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*** This document has been excerpted for purposes of this appendix. Only the relevant portion of the document is reproduced.

APPENDIX C

SUPREME COURT OF OHIO

No. 1999-0570

Submitted October 30, 2001
Decided December 11, 2002

DEROLPH, ET AL., *APPELLEES*,

v.

THE STATE OF OHIO, ET AL., *APPELLANTS*.

Constitutional law — Education — Schools — Current school-funding system unconstitutional —General Assembly directed to enact a school-funding scheme that is thorough and efficient.

Common Pleas Court of Perry County, No. 22043.
ON MOTION FOR RECONSIDERATION.

PFEIFER, J.

{¶1} In *DeRolph v. State* (2001), 93 Ohio St.3d 309, 310, 754 N.E.2d 1184 ("*DeRolph III*"), this court issued an

opinion with which none of the majority was "completely comfortable." As the author, Chief Justice Moyer, noted, we did so in an attempt to eliminate the "uncertainty and fractious debate" occasioned by our continued role in the case. Id. at 311, 754 N.E.2d 1184. A motion was filed asking this court to reconsider its decision. We granted that motion and ordered a settlement conference pursuant to S.Ct.Prac.R. XIV(6)(A). *DeRolph v. State* (2001), 93 Ohio St.3d 628, 758 N.E.2d 1113. Settlement efforts were unavailing, and we now rule on the merits of the case on reconsideration.

{¶2} In *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, syllabus, ("*DeRolph I*"), this court stated, "Ohio's elementary and secondary public school financing system violates Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state." In *DeRolph I*, this court admonished the General Assembly to create a new school-funding system, but otherwise provided no specific guidance as to how to enact a constitutional school-funding system. Id. at 213, 677 N.E.2d 733. See id. at 262, 677 N.E.2d 733 (Pfeifer, J., concurring) (the majority opinion "does neither more nor less than the syllabus law sets forth").

{¶3} Three years later, after the General Assembly had enacted various changes to the school-funding system, this court again determined that the school-funding system was unconstitutional. *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*"). We stated, " '[T]he sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools,' but rather a thorough and efficient system of common schools. *Miller v. Korns* (1923), 107 Ohio St. 287, 297-298,

140 N.E. 773, 776, approved and followed." *DeRolph II*, paragraph one of the syllabus. As in *DeRolph I*, the majority did not provide specific guidance to the General Assembly as to how to enact a constitutional school-funding system. But, see, *DeRolph II* at 47, 728 N.E.2d 993 (Pfeifer, J., concurring). Some of us praised the efforts of the General Assembly, and that praise was deserved. Id. at 41, 728 N.E.2d 993 (Douglas, J., concurring).

{¶4} We are aware of the difficulties that the General Assembly must overcome, and that is why we have been patient. The consensus arrived at in *DeRolph III* was in many ways the result of impatience. We do not regret that decision, because it reflected a genuine effort by the majority to reach a solution to a troubling constitutional issue. However, upon being asked to reconsider that decision, we have changed our collective mind. Despite the many good aspects of *DeRolph III*, we now vacate it. Accordingly, *DeRolph I* and *II* are the law of the case, and the current school-funding system is unconstitutional.

{¶5} To date, the principal legislative response to *DeRolph I* and *DeRolph II* has been to increase funding, which has benefited many schoolchildren. However, the General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Id., 78 Ohio St.3d at 212, 677 N.E.2d 733. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

{¶6} We are not unmindful of the difficulties facing the state, but those difficulties do not trump the Constitution. Section 2, Article VI of the Ohio Constitution states, "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools * * *." This language is essentially unchanged from the initial report from the Standing Committee on Education at the Constitutional Convention of 1850-51. I Report of the Debates and Proceedings of the Convention for the Revision of the Constitution, 1850-51 (1851) 693 ("Debates"). Even the minority report, presented by those opposed to the above language, had virtually the same import. It stated, "The General Assembly shall provide by law a system of common schools, and permanent means for the support thereof * * *." Id. at 694.

{¶7} The delegates and through them the people of this state expressed their desire for more and better education and their desire that the state should be responsible for it. Delegate J. McCormick, from Adams County, stated, "Under the old Constitution it is provided that public schools and the cause of education shall be forever encouraged; and, under this constitutional provision, we have trusted the General Assembly for forty-eight years; and we may trust them for forty-eight years longer, without any good result. * * * Our system of common schools, instead of improving in legislative hands, has been degenerating; and I think it is time that we should take the thing in hands ourselves." II Debates 702. William Hawkins, a delegate from Morgan County, said, "[W]e are warranted by public sentiment in requiring at the hands of the General Assembly a full, complete and efficient system of public education." Id. at 16. The delegates

perceived the General Assembly of that time as being insufficiently committed to education. Even though some delegates wanted to leave matters wholly to local authorities, see id. at 17, the delegates in their wisdom decided to include the Thorough and Efficient Clause in the Constitution. They and the people used the Constitution to command ongoing affirmative action by the General Assembly.

{¶8} James Taylor, a delegate from Erie County, stated, "I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child in the State, the offspring of the black man equally with that of the white man, the children of the poor equally with the rich." Id. at 11. Samuel Quigley, a delegate from Columbiana County, stated, "[T]he report directs the Legislature to make full and ample provision for securing a thorough and efficient system of common school education, free to all the children in the State. The language of this section is expressive of the liberality worthy a great State, and a great people. There is no stopping place here short of a common school education to all children in the State." Id. at 14. The delegates knew what they wanted, what the people wanted, and that it was necessary to use the Constitution to achieve what they wanted.

{¶9} The Thorough and Efficient Clause is part of our Constitution and part of our heritage. There were delegates who approved of even stronger language. Delegate McCormick proposed "a consolidation of all the general and local funds of the State, and distribution of the amount equally among the children of the State." II Debates at 17. Otway Curry, a delegate from Union County, expressed his concern that the Thorough and Efficient Clause would "prove totally

insufficient and powerless." Id. at 710. Were this court to avoid its responsibility to give continued meaning to the Constitution, his fears would become reality.

{¶10} The Constitution of this state is the bedrock of our society. It expressly directs the General Assembly to secure a thorough and efficient system of common schools, and it does so expressly because the legislature of the mid-nineteenth century would not. As R.P. Ranney, a delegate from Trumbull County, put it, "I desire to lay a plan such as within certain limits the Legislature shall be bound to carry out." Id. at 16.

{¶11} We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate must be met. The Constitution protects us whether the state is flush or destitute. The Free Speech Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, the Thorough and Efficient Clause of the Ohio Constitution, and all other provisions of the Ohio and United States Constitutions protect and guard us at all times. Harman Stidger, a delegate from Stark County, said, "If we should leave every thing to the Legislature, why not adjourn this Convention sine die, at once?" Id. at 11. The same could be said of this court and the Ohio Constitution.

Judgment accordingly.

RESNICK and F.E. SWEENEY, JJ., concur.
RESNICK, J., concurs separately.
DOUGLAS, J., concurs in judgment only.

LUNDBERG STRATTON, J., concurs in part and dissents in part.
MOYER, C.J., dissents.
COOK, J., dissents.

ALICE ROBIE RESNICK, J., concurring.

{¶12} I concur in today's majority opinion. Given the views I expressed in my dissent in *DeRolph v. State* (2001), 93 Ohio St.3d 309, 344-375, 754 N.E.2d 1184 ("*DeRolph III*"), I of course agree with this court's decision to vacate the majority opinion in *DeRolph III*. I have no desire to reiterate in detail the contents of that dissent, which were consistent with my views in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 ("*DeRolph I*"), and *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*"). It appears that much of what this court stated in *DeRolph I* and *II* has fallen on deaf ears. It is not likely that stating at length the same message once again would have much of an effect; rather, it probably would be preaching to the choir, in that only those whose viewpoints align with mine would listen, and the rest of the members of the General Assembly would continue to do nothing.

{¶13} That said, I regret that I must nevertheless write. Even though it seems that everything that can be said in this case has already been said, there is a need to send an additional message to the citizens of Ohio and to respond to the Chief Justice's critical dissenting opinion. The Chief Justice appears to be sending his own strong message to the General Assembly that there is no need to do anything further

in Ohio to provide each child an adequate education, beyond the trivial face-saving changes he proposes.

{¶14} To that end, the Chief Justice ignores the deficiencies in the legislative response thus far and, as did his majority opinion in *DeRolph III*, seems to believe that a half-fought battle is equivalent to a resounding victory as long as this court is no longer involved in this case. As one who has also been immersed in this case for a number of years, and as the author of the majority opinion in *DeRolph II*, I emphatically disagree with the Chief Justice's view of the legislative initiatives enacted in response to the pronouncements of this court.

{¶15} The Chief Justice bemoans the fact that further litigation may be inevitable in light of the decision today, calling that possibility an "unfortunate eventuality." Infra at ¶ 35 (Moyer, C.J., dissenting). However, what the Chief Justice's imperceptive view ignores is that as long as the General Assembly does not definitively fix the school-funding problem, which is its task alone, or at least make a realistic effort to do so, further litigation will be inevitable as a matter of course, since the court is the only body that definitively determines the constitutionality of laws.

{¶16} In the normal case, when this court finds a particular statute or series of statutes unconstitutional, there is no thought given to retaining jurisdiction, because we assume that our constitutional adjudication will be respected and that if the General Assembly decides to reenact similar legislation, it will take the necessary steps to transform what has been determined to be unconstitutional into something that complies with our Constitution. But as history shows, the General

Assembly has never mounted a concerted effort to fix the school-funding crisis and, given the tenor of the Chief Justice's dissent, will not be expected to put forth a good-faith effort to do so in the future. Given that state of affairs, it does seem likely that further litigation will be forthcoming in the area of school funding, even though it apparently will be under a name other than *DeRolph*. However, while the Chief Justice sees this situation as "unfortunate," I view it as inevitable precisely because so long as the system remains unconstitutional, our students' interests can be furthered only by continuing to press for the reformation of the system.

{¶17} As I and other members of this court have repeatedly stated, until a complete systematic overhaul of the system is accomplished, it will continue to be far from thorough and efficient and will continue to shortchange our students. The overreliance on local property taxes is the fatal flaw that until rectified will stand in the way of constitutional compliance. One thing the now-vacated majority opinion in *DeRolph III*, along with the various accompanying opinions, served to illustrate is that the system we have reviewed simply falls far short of satisfying the requirements of our Constitution. Today's result drives home that point, albeit belatedly.

{¶18} The Chief Justice disingenuously tries to blunt the force of this court's decisions in *DeRolph I* and *DeRolph II* by focusing only on the syllabus paragraphs of those two decisions and ignoring the full content and import of what this court actually said. He labels everything beyond the syllabus paragraphs in those two decisions "dicta," and thereby downplays the clear requirement voiced by the majority opinions in those two cases that our school-funding system will never be truly thorough and efficient until a complete

systematic overhaul of the system is accomplished. As the majority states, " 'a complete systematic overhaul' of the school-funding system" surely was the "core constitutional directive of *DeRolph I*" and also was a very large part of *DeRolph II*. Supra at ¶ 5.

{¶19} Of course, the Chief Justice was not in the majority in those two decisions, and his effort to recast this court's holdings into something more to his liking rings hollow. The Chief Justice's majority opinion in *DeRolph III* featured this same transparent ploy to justify his implausible view that a system that he had approved in his dissents in both *DeRolph I* and *DeRolph II* had somehow become unconstitutional in his eyes in *DeRolph III* (even though more improvements to the system had been made since *DeRolph II*), unless the further changes ordered by the *DeRolph III* majority were accomplished.

{¶20} In trying to recast the opinions in *DeRolph I* and *DeRolph II* into something that he can agree with, the Chief Justice attempts to pass off his own distorted vision of this case as if it were perfectly logical and well reasoned. In my view, today's decision, by vacating the majority opinion in *DeRolph III*, gives a fitting burial to an initiative of this court that was ill advised from the start.

{¶21} It becomes obvious that the only practical solution to the dilemma posed by this case lies with the citizens of Ohio. The voters of Ohio have the power to pass a constitutional amendment to the Thorough and Efficient Clause, Section 2, Article VI of the Ohio Constitution, which for all time will require an adequate amount of funding to be spent on every Ohio student regardless of where in the state that child

resides. A constitutional amendment is necessary to remedy the General Assembly's failure to perform its responsibilities.

{¶22} One possibility for amending the Thorough and Efficient Clause would be to adopt a requirement of a specific dollar amount of spending for each pupil and a formula for arriving at that number that would ensure that each district has sufficient funds to operate effectively year after year. In that scenario, it would be necessary to include a provision for adjusting the specific dollar amount, to keep pace with inflation and with any other changes in costs that may occur. In this way, if the per-pupil spending is established at an adequate level, overreliance on local property taxes will be eliminated. The state will thereby be required to fund the system at a level that complies with the specific constitutional mandate.

{¶23} I do not lightly advocate amendments to our state's Constitution, which already seems to be more detailed in many areas than it should be. However, in the school-funding area, the stakes are sufficiently high that I do not hesitate to make an exception in view of the General Assembly's reluctance to act. Our education system is the backbone of our democracy and the future of our state. We must give each student a realistic opportunity to succeed, and our current funding system does not do so. This continuing untenable situation has been allowed to endure for far too long, and far too many students have been shortchanged.

{¶24} A majority of this court now corrects a situation that was created simply by a desire for an expedient resolution of this case. Because the current school-funding legislation falls well short of satisfying the requirements of our Constitution,

I concur in today's decision and strongly encourage the citizens of Ohio to pursue a constitutional amendment that the General Assembly will not be able to ignore.

DOUGLAS, J., concurring in judgment only.

{¶25} The Chief Justice, in his dissent herein, in Section D, entitled "Summary," well states my position on the matter pending before us. I would, as he suggests, reaffirm our decision in *DeRolph III* with the exception of the wealth-screening issue. There are not, however, four votes for that approach. Accordingly, I concur only in the judgment of the majority.

Lundberg Stratton, J., concurring in part and dissenting in part.

{¶26} In *DeRolph* v. *State* (2001), 93 Ohio St.3d 309, 754 N.E.2d 1184 ("*DeRolph* III"), I concurred in the decision, not because I believed the school-funding system to be unconstitutional, but rather as a pragmatic compromise to end our role in defining what was "thorough and efficient," under the Ohio Constitution, because it was not our role in the first place to determine this issue. I continue to adhere to the dissents I joined in *DeRolph v.* State (1997), 78 Ohio St.3d 193, 677 N.E.2d 733, and *DeRolph v.* State (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*").

{¶27} I joined the majority that granted the motion to reconsider *DeRolph* III not because I "changed my collective mind" as the majority asserts, but because both sides

conceded that we had been provided faulty data which made the formulas before us inaccurate. Since we are not permitted to go outside the record, we could not have verified the evidence on our own accord. Having based our decision on testimony that was conceded by both parties to be wrong, it was legally necessary for us to reconsider it.

{¶28} The former majority has regrouped, and now merely declares the funding system not yet constitutional and dismisses the case. While I do not agree with its conclusion, I do believe that it is proper for the majority to dismiss the case once it has reached a finding of unconstitutionality. In that aspect, I differ with Chief Justice Moyer. In no case other than *DeRolph* have we retained jurisdiction once we have made a finding of unconstitutionality. We are not charged by the Constitution with fashioning new legislation that we believe meets the constitutional mandate. That role is assigned only to the legislature, and to the legislature has that role now been properly returned.

{¶29} Therefore, I dissent from the holding that the progress made under *DeRolph II* still falls short of a "thorough and efficient system," but given the majority's decision that the funding system is still unconstitutional, I agree that the majority is correct in not retaining jurisdiction.

MOYER, C.J., dissenting.

I
Majority Decision on Reconsideration

{¶30} On September 6, 2001, this court rendered its third decision on the merits in this case concerning the constitutionality of Ohio's system of funding public primary and secondary education. *DeRolph v. State* (2001), 93 Ohio St.3d 309, 754 N.E.2d 1184 ("*DeRolph III*"). On September 17, 2001, the defendants-appellants, the state of Ohio, the Ohio Board of Education, the Ohio Superintendent of Public Instruction, and the Ohio Department of Education (collectively referred to as "the state"), filed a motion asking this court to reconsider that decision.

{¶31} S.Ct.Prac.R. XI(2)(A)(4) allows a motion for reconsideration of a decision on the merits of a case. "We have invoked the reconsideration procedures set forth in S.Ct.Prac.R. XI to correct decisions which, upon reflection, are deemed to have been made in error." *State ex rel. Huebner v. W. Jefferson Village Council* (1996), 75 Ohio St.3d 381, 383, 662 N.E.2d 339. See, also, *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 697 N.E.2d 181.

{¶32} In November 2001, we granted the state's motion for reconsideration, thereby delaying issuance of a mandate. *DeRolph v. State* (2001), 93 Ohio St.3d 1470, 757 N.E.2d 381. See, also, S.Ct.Prac.R. XI(4). Rather than immediately reconsidering our holdings in *DeRolph III,* we first ordered a settlement conference pursuant to S.Ct.Prac.R. XIV(6)(A). 93 Ohio St.3d 628, 758 N.E.2d 1113. On March 21, 2002,

the court-appointed master commissioner, Howard Bellman, notified the court that mediation had not produced a resolution.

{¶33} Courts exist as forums for the resolution of disputes. Ideally, parties involved in litigation are able themselves to negotiate a settlement of their disputes, through mediation or otherwise. When that does not occur, it is the responsibility of the court to render a final judgment that fully and finally disposes of the issues presented to it. Generally, one or more litigants then feel vindicated while others are left to accept a judgment with which they disagree. Nevertheless, the court has done its work where the parties are able to accept the decision of the court as final, put their dispute behind them, and proceed in accordance with the judgment.

{¶34} Unfortunately, the majority today issues an opinion that ignores as many questions as it decides. It thereby evades its fundamental responsibility to resolve a dispute it agreed five years ago to resolve and leaves the citizens of Ohio with a decision that can at best be described as ambiguous.

{¶35} As a result, it is virtually inconceivable that today's judgment will, in fact, end litigation relative to the constitutionality of Ohio's current school-funding system. The issues will almost certainly again come before this, or another, Ohio court. I write today in anticipation of that unfortunate eventuality. Specifically, I write to reiterate that I do not consider dicta contained in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 ("*DeRolph I*"), or *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 ("*DeRolph II*"), to constitute the law of this case or controlling precedent.

{¶36} Unlike the majority, I do not believe the creation of a "complete systematic overhaul" to be the "core constitutional directive of *DeRolph I,*" majority opinion at ¶ 5, nor do I believe that the General Assembly is constitutionally required to make such an overhaul. See *DeRolph III,* 93 Ohio St.3d at 312, 754 N.E.2d 1184 ("It is the law *contained in the syllabi* to *DeRolph I* and *DeRolph II* and the principles established by court entry in the case at bar by which we are required to evaluate the constitutionality of the school-funding system now statutorily in place" [emphasis added]). Indeed, today's majority opinion at ¶ 2 acknowledges that *DeRolph I* did " 'neither more nor less than the syllabus law sets forth,' " quoting *DeRolph I,* 78 Ohio St.3d at 262, 677 N.E.2d 733 (Pfeifer, J., concurring).

{¶37} The majority today vacates our decision in *DeRolph III,* replaces it with little more than a summary proclamation of a change of "collective mind," declares the current school-funding system unconstitutional, and proclaims *DeRolph I* and *II* to be the law of the case. It thereby returns the parties (and all Ohio citizens) to the uncertain positions in which they stood two and one-half years ago on May 11, 2000, when *DeRolph II* was decided, with one exception: the majority fails to retain jurisdiction of the cause by the courts as it did after both *DeRolph I* and *DeRolph II.* In so doing, it implicitly declares this case concluded, yet does so without fully disposing of the issues that have developed during the litigation.

{¶38} The court in *DeRolph I* stayed the effect of its decision for 12 months and remanded the cause to the trial court, which was granted plenary jurisdiction to enforce that decision. *Id.*, 78 Ohio St.3d at 213, 677 N.E.2d 733. Shortly

thereafter, this court answered in the negative the trial court's question whether the Supreme Court should "retain exclusive jurisdiction of the case to review all remedial legislation enacted." *DeRolph v. State* (1997), 78 Ohio St.3d 419, 678 N.E.2d 886.

{¶39} Writing separately, I cited the general principle that "[t]ypically, when a Supreme Court declares a legislative act to be unconstitutional it does not order the legislative body to enact new legislation." Nevertheless, given the majority's unfortunate decision on the merits in *DeRolph I*, I concluded that "the most expeditious means of removing the uncertainty regarding the constitutionality of the new plan is for this court to issue an order retaining jurisdiction in this court." Id., 78 Ohio St.3d at 422, 678 N.E.2d 886 (Moyer, C.J., dissenting). This conclusion was based on my recognition that "uncertainty will envelop all aspects of public school funding in our state until the day this court deems a new funding system to be constitutional." Id. at 423, 678 N.E.2d 886 (Moyer, C.J., dissenting).

{¶40} When the deadline for compliance in *DeRolph I* had passed, the majority in *DeRolph II* again continued the case, for yet another year, until June 15, 2001. 89 Ohio St.3d at 38, 728 N.E.2d 993. This time, however, the court retained jurisdiction, in anticipation of further briefing in this court at that time.

{¶41} Today, however, the majority says nothing concerning enforcement of its reaffirmed declaration that the current school-funding system is unconstitutional. It neither retains jurisdiction in this court nor remands the cause to the trial court. More than five years after *DeRolph I*, the majority

today switches course by implicitly holding that a declaration of unconstitutionality, standing alone, adequately resolves the dispute before us.

{¶42} I believe that the majority, having twice ordered deadlines for compliance with its judgments, raised the expectation that it would ultimately render a decision that would be final. Had the majority chosen the more traditional course in 1997, it would now be acting consistently in simply declaring the system unconstitutional. But too much energy and too many resources have been expended, and the state has made too much progress, for the court now to excuse itself from the process. That is the reason I believe we should modify our decision in *DeRolph III*, resolve the issues, and terminate the role assumed by this court in creating public policy.

{¶43} The majority today directs the General Assembly to "enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I, DeRolph II*, and the accompanying concurrences." Supra at ¶ 5. I do not believe that the opinions in DeRolph *I* and *II* provide the General Assembly with clear guidance. I certainly do not believe that the opinions of individual members of the court as reflected in separate concurrences are binding in any litigation that may follow today's decision.

{¶44} The majority has yet to define what it means by "overreliance" on property tax, and Ohio's policymakers are left to wonder, "If the percentage of local to state funding were inverted would that be sufficient, or is the majority seeking only a fifty-one-percent reliance on state funds?" Id., 89 Ohio St.3d at 52, 728 N.E. 2d 993 (Moyer, C.J.,

dissenting). As guidance, the majority offers the observation that the General Assembly has done no more than merely "nibbl[e] at the edges" of the current system. Supra at ¶ 5. The infusion of billions of additional dollars into the public school system of this state in the last ten years, as demonstrated in the record before us, constitutes significantly more than "nibbling" at the edges or elsewhere.

{¶45} *DeRolph I* and *II* do not require the elimination of all qualitative differences among the state's local schools. This court has recognized in *DeRolph I* and *II,* and in other decisions in this cause, that communities that so choose may supplement their educational programs beyond minimum requirements. *DeRolph I*, 78 Ohio St.3d at 211, 677 N.E.2d 733; *DeRolph II*, 89 Ohio St.3d at 27-28, 728 N.E.2d 993. *DeRolph I* and *II* held that the funding system violates the Thorough and Efficient Clause of the Ohio Constitution; they did not hold that it violates the Equal Protection Clause. *DeRolph* I, 78 Ohio St.3d at 202, 677 N.E.2d 733, at fn. 5; DeRolph *v. State* (1998), 83 Ohio St.3d 1212, 699 N.E.2d 518.

{¶46} Nor do *DeRolph I* and *II* require the elimination of a statewide system of school funding based on property tax. Despite the majority's reliance on statements of individual members of the 1851 Constitutional Convention, historically, "[l]ocal property taxes have funded Ohio schools since 1825—*before* the adoption of the Education Clause." (Emphasis sic.) *DeRolph I*, 78 Ohio St.3d at 265, 677 N.E.2d 733 (Moyer, C.J., dissenting). They have constituted a major source of school funding ever since. To the extent that the majority's original finding of unconstitutionality in *DeRolph I* was based on indefensible deficiencies then

existing in some public school facilities, arguably supporting the contention that the local-property-based system then in place violated the Thorough and Efficient Clause, those conditions have been, or are being, ameliorated by the massive infusion of state funds into the public school system since this action was originally filed. *DeRolph I* was centered on the establishment of a floor of adequacy—a basic educational opportunity, as contemplated in *Miller v. Korns* (1923), 107 Ohio St. 287, 140 N.E. 773, and *Cincinnati School Dist. Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813.

{¶47} Despite today's decision, I fear that the weight of *DeRolph v. State* will continue to burden not only each of the three branches of state government, but also the school districts and school children the majority decision purports to be helping, as well as other recipients of state tax dollars, e.g., Ohio's public institutions of higher education.

II
Proposed Modification of *DeRolph III*

{¶48} As a justice of this court, it is my responsibility to respect and follow its decisions, even those with which I disagree. Our legal system relies on doctrines such as stare decisis and the law of the case to provide consistency in the application of the law. See *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 11 OBR 1, 462 N.E.2d 410 ("the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels"). Without consistency, the law risks the appearance of caprice.

{¶49} It is not unusual for me to join a judgment that is based on a decision with which I initially strongly disagreed. E.g. *Ford v. Talley Mach. Co.* (1994), 68 Ohio St.3d 473, 474, 628 N.E.2d 1351 (Moyer, C.J., concurring). As early as one month after *DeRolph I*, I noted the precedential import of that decision. Writing separately in the court's disposition of the state's motion for reconsideration and clarification, I recognized that a majority of this court had ordered the legislative branch of our state government to adopt new school-funding legislation within a year, observing that "[e]ven those who disagree with the judgment of the court recognize that it is their constitutional duty to respond constructively to it." *DeRolph v. State* (1997), 78 Ohio St.3d 419, 423, 678 N.E.2d 886 (Moyer, C.J., concurring in part and dissenting in part). Accord *State ex rel. Taft v. Franklin Cty. Court of Common Pleas* (1998), 81 Ohio St.3d 1244, 1247, 691 N.E.2d 677 (Moyer, C.J., concurring) ("I concur in the entry in this case because it is consistent with the views expressed in my separate opinion in [*DeRolph v. State* (1997), 78 Ohio St.3d 419, 678 N.E.2d 886], is consistent with the spirit underlying the majority opinions in [earlier *DeRolph* decisions], and is consistent with the best interests of the people of the state of Ohio"); *DeRolph v. State* (2001), 91 Ohio St.3d 1274, 1276, 747 N.E.2d 823 ("The merit issue is now the law of the case as established by the majority").

{¶50} In *DeRolph III*, we concluded that "[i]t is the law contained in the syllabi to *DeRolph I* and *DeRolph II* and the principles established by court entry in the case at bar by which we are required to evaluate the constitutionality of the school-funding system now statutorily in place." 93 Ohio St.3d at 312, 754 N.E.2d 1184. Our conclusion was consistent with my past judicial practice of acknowledging the

law established in prior decisions and was reached in the hope that *DeRolph III* would extricate the court from the circumstances created by a majority of the court. I believed that approach to be consistent with my duty to this court and to the citizens this court serves.

{¶51} In *DeRolph III*, a majority of this court found that the General Assembly had, in the ten years since this case began, crafted significant legislation to address and correct egregious conditions in the poorest of Ohio schools. It recognized that these conditions, upon which this court's original finding of unconstitutionality in *DeRolph I* was based, had been largely ameliorated by programs to remedy severe building deterioration and perceived funding inequities. Id., 93 Ohio St.3d at 323, 754 N.E.2d 1184. We concluded that certain relatively minor modifications to the funding plan adopted by the General Assembly still needed to be made, but acknowledged that these changes would "not require structural changes to the school foundation program set forth in R.C. Chapter 3317." Id. at 325, 754 N.E.2d 1184.

{¶52} The state urges us to reconsider our holdings (1) that wealth screens may not be used in the state's school-funding foundation formula and (2) that the changes to the foundation formula ordered in *DeRolph III* should be retroactively applied as of July 1, 2001. I would modify *DeRolph III* as discussed below.

A
Inaccuracies in the Record

{¶53} In explaining our grant of a motion for reconsideration of *DeRolph III*, we noted, "Both sides acknowledge * * * that

the evidence and one of the briefs filed in *DeRolph III* contained inaccurate analysis regarding the cost of funding the base cost formula with wealth screens eliminated." *DeRolph v. State* (2001), 93 Ohio St.3d 628, 631, 758 N.E.2d 1113. The court should now acknowledge the deficiencies in the record before us at the time *DeRolph III* was decided and respond in a constructive manner to preserve the goal of *DeRolph III*, that being extrication of the judiciary from the policy-making role it wrongfully assumed in its earlier *DeRolph* decisions.

B
Wealth Screens

{¶54} We noted in *DeRolph III* that the General Assembly, in 2001 Am.Sub.H.B. No. 94 ("H.B. 94"), determined the base cost of an adequate education to be $4,814 per student in fiscal year 2002. 93 Ohio St.3d at 313, 754 N.E.2d 1184. In arriving at that figure, the General Assembly began by using "the unweighted average cost per student of educating students enrolled in selected districts," excluding the richest and poorest: "Under the new law, this selection began with one hundred seventy school districts that, in fiscal year 1999, met at least twenty of twenty-seven performance standards established by H.B. 94. R.C. 3317.012(B)(1)(a) through (aa). Districts in the top and bottom five percent of income and property wealth bases are deleted to adjust for anomalies within those districts, leaving one hundred twenty-seven model districts." Id.

{¶55} The parties use the term "wealth screens" to refer to the process of eliminating the top and bottom 5 percent of schools from the group of schools whose costs are averaged

to determine base per-pupil cost. We held in *DeRolph III* that the per-pupil base cost formula "must be modified to include the top five percent districts and the lower five percent districts," thereby ordering the elimination of wealth screens from the process by which per-pupil base cost is determined. Id. at 324, 754 N.E.2d 1184.

{¶56} Elimination of wealth screens would result in the inclusion of several school districts whose per-pupil spending is unusually high. In their brief filed in *DeRolph III*, the plaintiffs-appellees imputed ulterior motives to the General Assembly in incorporating wealth screens into the foundation formula, describing their use as an arbitrary manipulation to artificially lower the per-pupil base cost. See 93 Ohio St.3d at 332-333, 754 N.E.2d 1184 (Douglas, J., concurring). In contrast, the state contends that the use of wealth screens is wholly justifiable, in that "inclusion of data from the top and bottom five percent of districts has a dramatic effect and distorts the base cost calculation." In other words, the state argues that inclusion of the top and bottom 5 percent of school districts skews the average.

{¶57} In support of its motion for reconsideration, the state has provided us with convincing evidence[3] in support of its

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[3] The procedural posture of this case is unique; since *DeRolph II* there has not been a traditional record of facts produced in a trial court. It is appropriate that we accept supplementary evidence such as the affidavits of experts submitted by both parties. See *DeRolph v. State* (2001), 91 Ohio St.3d 1274, 1275, 747 N.E.2d 823 ("*DeRolph* is not a traditional appeal, in which the court has a previously established record available for review. Rather, *DeRolph* has become a hybrid which will require this court to

contention that "the use of wealth screens is standard practice throughout school finance and the discipline of statistics generally." It has provided us ample justification, more persuasively presented than in the briefs on the merits, for rejecting the proposition that the General Assembly's adoption of wealth screens was merely an attempt to artificially lower the final per-pupil base cost, that it evidences unlawful "residual budgeting," or that it was otherwise purely arbitrary. The record contains expert testimony from both sides supporting the use of wealth screens as an appropriate means of determining per-pupil base cost, as follows:

{¶58} • William Driscoll, an expert for the plaintiffs-appellees, testified in a deposition that he agreed with a report that stated, "Standard statistical analyses typically use 5% to estimate the tails at either end of a distribution. In this case, the tails or extreme observations do fall, in fact, in approximately the lowest and highest 5% of the range."

{¶59} • David Monk, an expert for the state and Dean of the College of Education at the Pennsylvania State University, testified in an affidavit that a "5% exclusion of this kind is a well established practice within the field of school finance given the common existence of highly atypical school districts in the tails of wealth and income distributions." Dean Monk stated that the General Assembly's "decision to use a version of the observed best practices method as the basis for its estimation of the cost of an adequate education presumes the availability of a standard that is relevant to the affected

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engage both in factfinding and application of law to those facts * * * ").

districts. * * * The purpose of the 5 percent exclusion rule is to remove highly atypical districts and to thereby preserve the spirit as well as the integrity of the standard."

{¶60} • Dr. John Augenblick, an expert consulted by the General Assembly during its legislative deliberations, testified at trial in 1998 that the spending by Ohio school districts within the top and bottom 5 percent based on wealth was atypical and should not be included in the averaging process. Dr. Augenblick testified that wealthy districts falling in the upper 5 percent of spending "provide things that go well beyond what you might think are kind of the basic or adequate services."

{¶61} • Wendy Zahn, a senior budget analyst for the Legislative Service Commission, stated that it is important to reduce the effects of the extremes of a distribution when data distribution is not normal and that "a widely used method for eliminating outliers" is to use the 5th percentile to the 95th percentile.

{¶62} • Dr. William I. Notz, professor of statistics at the Ohio State University, stated:

{¶63} "If the mean of a set of data with the most extreme values removed differs markedly from the mean computed using all the data, the extreme values would be considered outliers. In such a case, standard practice is to consider the trimmed mean as more representative [of] the center of the data.

{¶64} "Data such as income and property values typically contain outliers and it is not surprising that the school district

expenditure data shows evidence of outliers. If data from all school districts meeting the 20-27 standards are used, the base cost (average expenditures per pupil) is $5,032. Inflated to FY02 values, this number becomes $5,467. If the same quantity is computed after deleting the wealthiest 5% and poorest 5% of the districts, and is inflated to FY02 values, this number (a trimmed mean) becomes $5,023. This would be considered a marked difference *and the trimmed mean ($5,023) would be considered more representative of a typical value."* (Emphasis added.)

{¶65} The plaintiffs-appellees remain adamantly opposed to the use of an "inferential methodology" based on model school districts to derive a foundation formula for funding public education. Wealth screens are one aspect of such a funding approach. However, the General Assembly—not the plaintiffs-appellees or this court—remains the entity constitutionally charged with the responsibility of establishing a thorough and efficient system of common schools. As recognized by the majority in *DeRolph II*, 89 Ohio St.3d at 18, 728 N.E.2d 993, "deciding what methodology to adopt is a policy determination."

{¶66} There is nothing inherently unconstitutional in the method chosen by the General Assembly. Moreover, both the state and the plaintiffs-appellees have acknowledged that "the evidence and one of the briefs filed in *DeRolph III* contained inaccurate analysis regarding the cost of funding the base cost formula with wealth screens eliminated." 93 Ohio St.3d at 631, 758 N.E.2d 1113.

{¶67} Upon reconsideration, and specifically in view of the fact that we had been provided inaccurate data at the time

DeRolph III was decided, I believe our decision should be modified pursuant to S.Ct.Prac.R. XI. I am persuaded that the General Assembly's incorporation of wealth screens in determining the school foundation formula is acceptable. Accordingly, I would modify our opinion in *DeRolph III* to allow the exclusion of the top and bottom 5 percent of school districts in the calculation of per-pupil base costs as required by H.B. 94.

C
Effective Date of Formula Changes

{¶68} Our order in *DeRolph III* required that changes to the foundation formula be applied retroactively to July 1, 2001. 93 Ohio St.3d at 324, 754 N.E.2d 1184. The state argues that this aspect of our decision "contrasts sharply with the Court's prior decisions in this case and the practical considerations they recognize, as well as other precedent under the Ohio Constitution."

{¶69} We are now well into the second year of the financial biennium that began on July 1, 2001. The state contends that any changes to the foundation formula ordered by this court will require time to implement and that economic circumstances have changed in the state since *DeRolph III* was announced. I agree that the effective date prescribed by *DeRolph III* is no longer realistic. Moreover, the further July 1, 2001, recedes into the past, the more likely it is that retroactive application of *DeRolph III* to that date would result in a one-time infusion of additional funds unconnected to the current budgets of school districts.

{¶70} Upon reconsideration, I believe that the changes to the school foundation formula ordered in *DeRolph III*, modified as stated herein, should be implemented effective July 1, 2003, and applied to the subsequent years designated in R.C. 3317.012(A)(1).

D
Summary

{¶71} I would hold that wealth screening of school districts as mandated by H.B. 94 may be used in determining per-pupil base cost for purposes of the school foundation formula. I would also reaffirm our decision in *DeRolph III* that the state, having elected to retain a foundation program based on the average spending of selected districts, must determine that base cost by using only those school districts meeting the performance standards set by R.C. 3317.012(B)(1)(a) through (aa) without rounding to include additional lower-spending districts and without adjusting for the echo effect, effective July 1, 2003. Cf. *DeRolph III*, 93 Ohio St.3d at 324-325, 754 N.E.2d 1184.

{¶72} Our decision in *DeRolph III* should otherwise be reaffirmed, including our holding that the parity aid program established by the General Assembly must be fully funded not later than July 1, 2003. Id. at 325, 754 N.E.2d 1184.

COOK, J., Dissenting.

{¶73} For the reasons I have expressed throughout this court's consideration of this cause, the court should dismiss this case. See *DeRolph v. State* (2001), 93 Ohio St.3d 309, 380-383, 754 N.E.2d 1184 (Cook, J., dissenting).

Bricker & Eckler, L.L.P., Nicholas A. Pittner, John F. Birath Jr., Sue W. Yount, Quintin F. Lindsmith and Susan B. Greenberger, for appellees.

Betty D. Montgomery, Attorney General, Mary Lynn Readey, Roger F. Carroll and James G. Tassie, Assistant Attorneys General, for appellants.

APPENDIX D

THE SUPREME COURT OF OHIO

Case No. 99-570

Filed Dec. 11, 2002

Dale R. DeRolph, Parent and Next Friend of Nathan DeRolph, et al., Appellees,	)
v.	)
State of Ohio et al., Appellants.	)

Appeal from the Court of Common Pleas

JUDGMENT ENTRY

This cause is before the Court upon appellants' motion for reconsideration. Upon further consideration thereof,

IT IS ORDERED by the Court that, consistent with the opinion rendered herein, the decision entered in this case on September 6, 2001 be, and hereby is, vacated and that this Court's decisions in DeRolph v. State (1997) 78 Ohio St.3d 193, 677 N.E.2d 733, and DeRolph v. State (2000) 89 Ohio

St.3d 1, 728 N.E.2d 993, are the law of the case and that the current school-funding system is unconstitutional.

It is further ordered that the appellees recover from the appellants their costs herein expended; and that a mandate be sent to the Court of Common Pleas for Perry County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Common Pleas for Perry County for entry.

COSTS:

Docket Fee, $40.00, paid by Attorney General of Ohio.

(Perry County Court of Common Pleas; No. 22043)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX E

THE SUPREME COURT OF OHIO

Case No. 99-570

Filed Dec. 11, 2002

Dale R. DeRolph, Parent and Next Friend of Nathan DeRolph, et al., Appellees,	)
v.	)
State of Ohio et al., Appellants.	)

MANDATE

To the Court of Common Pleas

Within and for the County of Perry, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

IT IS ORDERED by the Court that, consistent with the opinion rendered herein, the decision entered in this case on

September 6, 2001 be, and hereby is, vacated and that this Court's decisions in DeRolph v. State (1997) 78 Ohio St.3d 193, 677 N.E.2d 733, and DeRolph v. State (2000) 89 Ohio St.3d 1, 728 N.E.2d 993, are the law of the case and that the current school-funding system is unconstitutional.

COSTS:

Docket Fee, $40.00, paid by Attorney General of Ohio.

(Perry County Court of Common Pleas; No. 22043)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX F

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Sec. 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX G

CONSTITUTION OF THE STATE OF OHIO

ARTICLE VI: EDUCATION

§ 2 School funds.

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

APPENDIX H

IN THE SUPREME COURT OF OHIO

Case No. 03-0447

Filed March 10, 2003

ORIGINAL ACTION FOR WRIT OF PROHIBITION

STATE, EX REL. STATE OF OHIO	)
Relator,	)
v.	)
THE HONORABLE JUDGE LINTON D. LEWIS, JR., *et al.*	)
Respondents.	)

ANSWER OF RESPONDENTS-INTERVENORS, THE *DeROLPH* PLAINTIFFS AND THE OHIO COALITION FOR EQUITY & ADEQUACY OF SCHOOL FUNDING

For their Answer to the Complaint, Respondents-Intervenors, the Plaintiffs in *DeRolph v. Ohio* (July 1, 1994), Perry C.P. No. 22043, unreported (hereinafter "*DeRolph* Plaintiffs")[1] and the Ohio Coalition for Equity & Adequacy of School Funding ("Coalition"), admit, deny and aver as follows:

FIRST DEFENSE

1. In response to paragraph #1 of the Complaint, the *DeRolph* Plaintiffs and the Coalition state that Relator, State of Ohio, was a defendant in the lawsuit *DeRolph v. State*, filed in the Perry County Court of Common Pleas, Original Case No. 22043, Ohio Supreme Court Case Nos. 95-2066 and 99-570. The *DeRolph* Plaintiffs and the Coalition deny the remaining allegations of paragraph #1 of the Complaint.

2. In response to paragraph #2 of the Complaint, the *DeRolph* Plaintiffs and the Coalition admit that Respondents include the Honorable Linton D. Lewis, Jr., the Common Pleas Court Judge of Perry County, Ohio, and the Common Pleas Court of Perry County. The *DeRolph* Plaintiffs and the Coalition state that the law regarding jurisdiction of a common pleas court speaks for itself. The *DeRolph* Plaintiffs and the Coalition deny each and every other allegation of paragraph #2 of the Complaint.

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[1] The *DeRolph* Plaintiffs are identified with particularity in Plaintiffs' First Amended Complaint, attached as Exhibit C to Plaintiffs' Motion for Compliance Conference, Exhibit F to Relator's Complaint.

3. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #3 of the Complaint.

4. In response to paragraph #4 of the Complaint, the *DeRolph* Plaintiffs and the Coalition state that on or about December 19, 1991, Dale DeRolph and other plaintiffs filed a lawsuit for declaratory and injunctive relief in the Perry County Court of Common Pleas alleging that Ohio's public elementary and secondary school funding system was unconstitutional on several grounds, including that the system violated the thorough and efficient clause of Section 2, Article VI of the Ohio Constitution. The *DeRolph* Plaintiffs and the Coalition deny any remaining allegations of paragraph #4 of the Complaint.

5. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #5 of the Complaint.

6. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #6 of the Complaint.

7. The *DeRolph* Plaintiffs and the Coalition admit that on May 11, 2000, the Ohio Supreme Court held that the State's system of school funding was still unconstitutional in *DeRolph v. State* (2000), 89 Ohio St. 3d 1 (*DeRolph II*), but deny that there had been restructuring of the system. The *DeRolph* Plaintiffs and the Coalition admit the remaining allegations of paragraph #7 of the Complaint.

8. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #8 of the Complaint.

9. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #9 of the Complaint.

10. In response to paragraph #10 of the Complaint, the *DeRolph* Plaintiffs and the Coalition admit that the Supreme Court did not retain jurisdiction. The *DeRolph* Plaintiffs and the Coalition deny the remaining allegations of paragraph #10 of the Complaint.

11. The *DeRolph* Plaintiffs and the Coalition admit the allegations of paragraph #11 of the Complaint.

12. The *DeRolph* Plaintiffs and the Coalition deny the allegations of paragraph #12 of the Complaint.

SECOND DEFENSE

13. The admissions, denials, and averments of paragraphs #1 through #12 of this Answer are incorporated by reference as if fully set forth herein.

14. The *DeRolph* Plaintiffs and the Coalition deny the allegations of paragraph #14 of the Complaint.

15. The *DeRolph* Plaintiffs and the Coalition deny the allegations of paragraph #15 of the Complaint.

THIRD DEFENSE

16. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

17. The Complaint fails to state a claim upon which relief may be granted.

FOURTH DEFENSE

18. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

19. The Complaint seeks an order of this Court which would, if granted, represent an unwarranted infringement on the constitutional and statutory rights and responsibilities of Respondents Perry County Common Pleas Court and Judge of that Court because the Respondents are a court of general jurisdiction with subject matter jurisdiction over *DeRolph v. State* for the purpose of issuing remedial orders consistent with the orders of this Court.

FIFTH DEFENSE

20. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

21. Respondent, as an Ohio Common Pleas Court, does not "patently and unambiguously" lack jurisdiction to consider the Motion For Compliance Conference submitted by the *DeRolph* Plaintiffs. Respondent has the right to determine, in the first instance, whether it has that jurisdiction and whether that jurisdiction should be exercised as requested in the Motion. Relator has an adequate remedy at law by way

of appeal from any appealable orders that might be issued by Respondent.

SIXTH DEFENSE

22. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

23. Relator has failed to plead sufficient facts to demonstrate, and in fact cannot establish, that the Motion For Compliance Conference, if granted, would result in harm to Relator sufficient to warrant relief from this Court.

SEVENTH DEFENSE

24. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions, denials and averments in this Answer as if fully set forth herein.

25. Divesting the Trial Court of the authority to provide a remedy for the constitutional wrongs declared in *DeRolph v. State* (2002), 97 Ohio St.3d 434 (*DeRolph IV*) would violate the substantive due process rights of the *DeRolph* Plaintiffs and Ohio's public school children in contravention of the United States and Ohio Constitutions.

SEVENTH DEFENSE

26. The *DeRolph* Plaintiffs and the Coalition incorporate by reference all of the preceding admissions,

denials and averments in this Answer as if fully set forth herein.

27. Relator, the Ohio Attorney General, is estopped from asserting the claims in the Complaint by the oath or affirmation he was required to take before entering upon his duties, which oath or affirmation was to support the Constitution of the United States and this state. See, Section 7, Article XV of the Ohio Constitution. The relief sought in the Complaint would perpetuate the continuing violation of constitutional rights of *DeRolph* Plaintiffs and Ohio's public school children.

WHEREFORE, the *DeRolph* Plaintiffs and the Coalition having answered the Relator's Complaint in this matter, respectfully request this Court to dismiss this action at Relator's costs.

Respectfully submitted,
/s/_____

Nicholas A. Pittner (0023159)
Counsel of Record
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
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Telephone: (614) 227-2300
Facsimile: (614) 227-2390

Attorneys for Intervenors

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer of Respondents-Intervenors, the *DeRolph* Plaintiffs and the Ohio Coalition for Equity & Adequacy of School Funding, has been served upon Roger F. Carroll, Counsel of Record, Assistant Attorney General, 30 East Board Street, 16th Floor, Columbus, Ohio 43215-3428, via regular U.S. Mail postage prepaid, this _____ day of March, 2003.

/s/_____
Sue W. Yount

APPENDIX I

IN THE COMMON PLEAS COURT,
PERRY COUNTY, OHIO

Original Case No. 22043

Ohio Supreme Court
Case No. 99-570

Filed March 4, 2003

DALE R. DeROLPH, *et al.*,

Plaintiffs,

v.

STATE OF OHIO, *et al.*,

Defendants.

Judge Linton D. Lewis, Jr.

PLAINTIFFS' MOTION FOR COMPLIANCE CONFERENCE

Plaintiff's Motion for Compliance Conference and Memorandum in Support

Pursuant to this Court's 1999 Order requiring Defendants to forthwith prepare a report setting forth proposals for complying with the Court's judgment therein, and pursuant to the directives and mandate of the Ohio Supreme Court, Plaintiffs hereby move this Court to schedule and conduct a conference to address Defendants' compliance with the orders of this Court and the Ohio Supreme Court. The reasons for this Motion are set forth in the attached Memorandum in Support.

/s/_____

Nicholas A. Pittner (0023159)
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
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MEMORANDUM IN SUPPORT

Introduction

"No man is above the law and no man below it: nor do we ask any man's permission when we ask him to obey it."

— Theodore Roosevelt

Before the bench, all parties stand as equals. The State of Ohio is subject to the law no less than the most common of our citizens. Today, Plaintiffs and the 1.8 million Ohio schoolchildren affected by the rulings in this case ask the Court to begin the process of overseeing the development of the school funding system to which they are entitled under the law.

In response to the State's Motion for Reconsideration of *DeRolph v. State* (2001), 93 Ohio St.3d 309, 754 N.E.2d 1184 (*"DeRolph III"*), the Supreme Court issued a decision on December 11, 2002, vacating its prior holding in *DeRolph III* and reinstating as the law of the case its prior decisions in *DeRolph v. State* (1997), 78 Ohio St.3d 193, 677 N.E.2d 733 (*"DeRolph I"*) and *DeRolph v. State* (2000), 89 Ohio St.3d 1, 728 N.E.2d 993 (*"DeRolph II"*). *DeRolph v. State* (2002), 97 Ohio St.3d 434, 2002-Ohio-6750 (*"DeRolph IV"*). The Supreme Court's ruling established beyond question that *"[D]eRolph I* and *DeRolph II* are the law of the case and the current school funding system is unconstitutional." *Id.* at 435.

In reaching that decision, the Court recognized the intent of the framers to impose binding obligations on the General Assembly.

> Otway Curry, a delegate from Union County, expressed his concern that the Thorough and Efficient Clause would "prove totally insufficient and powerless." *Were this court to avoid its responsibility to give continued meaning to the Constitution, his fears would become reality.*
>
> The Constitution of this state is the bedrock of our society. It expressly directs the General Assembly to secure a thorough and efficient system of common schools, and it does so expressly because the legislature of the mid-nineteenth century would not.

Id. at 436 (Internal citation omitted). (Emphasis added.) The Court specifically directed the result that must now be attained.

> [T]he General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding system that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

Id. at 435 (Internal citation omitted).

The Supreme Court did not retain jurisdiction of the case nor did it issue specific orders for further proceedings. The Court did, however, direct this Court, by judgment entry and mandate, both issued on December 11, 2002, to "proceed without delay to carry [the Supreme Court's] judgment in this cause into execution." *DeRolph v. State* (December 11, 2002), Case No. 99-570 (mandate of the Ohio Supreme Court, *DeRolph v. State,* 97 Ohio St.3d 434). (*Exhibits A* and *B*, attached.) Plaintiffs now move this Court to schedule and conduct a compliance conference to consider the State's plan for compliance with the orders of the Supreme Court, as well as with the remedial orders previously issued by this Court and stayed during the pendency of the appeal to the Supreme Court.

Because Plaintiffs' Amended Complaint in this case set forth valid claims for both a declaratory judgment *and* injunctive relief pursuant to that declaration, this Court has always had jurisdiction to address the latter, except during the pendency of the appeal. *DeRolph v. Ohio,* Case No. 22043 (First Amended Complaint for Declaratory and Injunctive Relief). (*Exhibit C*, attached.) With the declaratory judgment portion of this case conclusively ended by *DeRolph IV*, it is now time for this Court to proceed to secure the implementation of a remedy. The Court has both the right and responsibility to do so.

In this Court's initial *DeRolph* decision, issued July 1, 1994, and in its decision of February 26, 1999, the Court recognized the necessity for remedial orders and issued orders appropriate to the unique nature of this case. *DeRolph v. Ohio* (July 1, 1994), Perry C.P. No. 22043, unreported;

DeRolph v. State (1999), 98 Ohio Misc. 2d 1, 712 N.E.2d 125. In the latter decision, after ruling that the State had failed to comply with the Supreme Court's *DeRolph I* mandates, the Court issued the following direction to Defendants:

> It is this Court's desire to retain jurisdiction for a period of time to assure that this Order is followed and steps are being taken to resolve the matters involved in the case at bar. Therefore, the Superintendent of Public Instruction for the State of Ohio and the State Board of Education are required to forthwith prepare a report setting forth proposals for complying with the Order of this Court and the directives of the Ohio Supreme Court. The same shall be presented to the Legislature upon completion. Thereafter, the State Superintendent and the State Board of Education shall forthwith prepare a report after the legislative session for calendar year 1999 setting forth the steps taken to resolve the issues in the case at bar.

DeRolph v. State, 98 Ohio Misc.2d at 263. The Court's orders (hereafter, the "1999 orders") were clearly designed to require the State to begin the development of a constitutional funding system while not unduly encroaching upon the legislative process necessary to enact that system. The Court expressly retained jurisdiction to assure compliance with its 1999 orders, and it indicated that it would monitor the State's progress, "[u]pon a timely motion by either party or by a motion of this Court." *Id.* at 252.

The Court's 1999 orders were stayed pending the State's appeal to the Supreme Court. (*Exhibit D*, attached.) That stay expired on December 11, 2002, when the Supreme Court issued its *DeRolph IV* decision, a decision which confirmed this Court's declaration that the school funding system is unconstitutional. The Supreme Court has now relinquished its jurisdiction over this case. Consequently, jurisdiction has re-vested in this Court for remedial actions consistent with the decisions of the Supreme Court. The fact that no specific directions were given to this Court by the Supreme Court (other than the mandate to carry the Supreme Court's judgment into effect) is consistent with common law and statutory authority which require no such direction to enable trial courts to carry into execution the judgments of appellate courts.

This Court's 1999 remedial orders represent a reasonable approach to the difficult issue of judicial oversight of the legislative process. While Plaintiffs are not asking the Court to dictate the content of remedial legislation, the Court also cannot permit the continued denial of Plaintiffs' right to a constitutionally compliant system of public education. Judicial monitoring and oversight are essential if such a system is to be developed in Ohio. Indeed, it is more critical today than it was in 1999 that the Court fulfill this role, since without oversight by this Court, it is apparent that Plaintiffs will continue to be denied their constitutional right to a thorough and efficient system of public education. [1]

[1] Public pronouncements of Defendants and Governor Taft since the Supreme Court's *DeRolph IV* decision make it clear that Defendants mistakenly believe that because the Supreme Court did not retain

I. This Court Has Continuing Jurisdiction To Enforce The Supreme Court's *DeRolph IV* Decision.

This Court derives its authority from the Ohio Constitution and laws enacted in furtherance of the constitutional grant of judicial power. In particular, Section 4 of Article IV includes the grant of original jurisdiction to common pleas courts over "[a]ll justiciable matters *** as may be provided by law."

This case was initially brought as an action for both declaratory and injunctive relief pursuant to R.C. Chapter 2721. The law is well established that a common pleas court may not only declare the rights of the parties in a declaratory judgment action brought under R.C. Chapter 2721, but it also may order injunctive relief consistent with the rights so declared. Although R.C. 2721.09 authorizes the filing of additional pleadings seeking further relief following a judicial declaration of rights, additional pleadings are not required where, as in this case, the initial complaint included claims for injunctive relief. *Peltz v. City of South Euclid* (1967), 11 Ohio St.2d 128, 40 O.O.2d 129, 228 N.E.2d 320 (permanently enjoining the enforcement of an ordinance "to the extent of its constitutional infirmity"); *American Life & Acc. Ins. Co. of Ky. v. Jones* (1949), 152 Ohio St. 287, 40

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jurisdiction of this case, they are under no obligation to take any action to comply with *DeRolph IV*. But it is fundamental that orders of the Supreme Court directed to the Defendants are binding on them and, as demonstrated herein, are enforceable in this Court. Additional direction from the Supreme Court to this Court was unnecessary.

O.O. 326, 89 N.E.2d 301 (interpreting G.C. 12102-8, predecessor to R.C. 2721.09, as providing authority to grant any further necessary or proper relief following an entry of declaratory judgment); *Clermont County ADAMH Boards v. Hogan et al.* (1995), 1995 Ohio App. LEXIS 4795, *aff'd in part, rev'd in part* on other grounds, (1997), 79 Ohio St.3d 358, 1997 Ohio 31, 681 N.E.2d 1322, citing *Central Motors Corp. v. Pepper Pike* (1979), 63 Ohio App.2d 34, 62, 409 N.E.2d 258 ("[a] trial court has continuing authority under R.C.2721.09 and its general equity powers to fashion any remedy necessary to assure the enforcement of its decree"). Accord *McCann v. Kerner et al.* (C.A.7, 1971), 436 F.2d 1342 ("[Section 2202, Title 28, U.S. Code, the federal analog to R.C. 2721.09] contemplates that subsequent to the issuance of a declaratory judgment [holding a state statute unconstitutional], a court may upon notice and hearing grant injunctive relief to protect and enforce its judgment"); *Vermont Structural Slate Co. v. Tatko Bros. Slate Co.* (C.A.2, 1958), 253 F.2d 29 ("[t]here was ample residual power in the court to issue this permanent injunction [under Section 2202, Title 28, U.S. Code], even though the original decree contained no such provision"). Thus, it is within the general equity powers of this Court to fashion any remedial orders necessary to the enforcement of its decree.

This Court's 1999 orders were remedial in nature and issued pursuant to the Court's declaration that Ohio's school funding system was unconstitutional, a declaration consistent with the Ohio Supreme Court's *DeRolph I* decision and since

confirmed by the subsequent decisions of that court.[2] Had there been no appeal of the 1999 decision and orders, there would be no question that the Court not only had jurisdiction to enforce those orders, but also that the Court expressly retained that jurisdiction for the purpose of enforcement. See *Horn & Hardart Co. v. National RR. Passenger Corp.* (D.C. 1987), 659 F.Supp. 1258, *aff'd*, (C.A.D.C. 1988), 843 F.2d 546 ("it would be incongruous for district courts to have the absolute right to hear petitions for further relief when no appeal is lodged but no right after an appeal unless expressly granted by an appellate court").

The intervening appeal to the Ohio Supreme Court stayed, but did not diminish in any way, this Court's inherent authority to enforce the remedial 1999 orders. To the contrary, the intervening decisions of the Supreme Court in *DeRolph II* and *DeRolph IV* have clearly established, as the law of this case, the unconstitutionality of Ohio's school funding system and the requirement of comprehensive reform. The declaratory judgment portion of this case is now concluded, but this Court remains vested with the authority to enforce the development and implementation of a remedy.

II. The Supreme Court's Mandate In *DeRolph IV* Must Be Enforced By This Court.

Separate and apart from the foregoing grounds for monitoring compliance, this Court is obliged to comply with the Supreme Court's mandate to "proceed without delay to

[2] Of course, the passage of time has made the compliance dates obsolete and an updated compliance schedule is now appropriate.

carry [the Supreme Court's] judgment in this cause into execution." *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*) The Supreme Court's mandate provides independent authority for the Court's monitoring and oversight of the State's progress in remedying that which has been declared unconstitutional. See *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675, 588 N.E.2d 176, 178, citing 5B Corpus Juris Secundum (1958) 529, Appeal and Error, Section 1958 ("The mandate of the appellate court is the order directing the action to be taken or disposition to be made of the cause by the lower court, returning the proceedings to the lower court, *and reinvesting it with jurisdiction thereof*"). (Emphasis added.)

The Ohio Revised Code broadly empowers the Supreme Court to send its judgments to the court below "for specific or general execution, or to the inferior courts for further proceedings." R.C. 2503.44. Moreover, R.C. 2505.39 provides as follows:

> A court that reverses or affirms a final order, judgment, or decree of a lower court upon appeal on questions of law, shall not issue execution, but shall send a special mandate to the lower court for execution or further proceedings. *The court to which such mandate is sent shall proceed as if the final order, judgment, or decree had been rendered in it.*

R.C. 2505.39. (Emphasis added.)

Accordingly, the Court must proceed as if the judgment in *DeRolph IV* had been rendered in this Court. See *Cleveland Elec. Illuminating Co. v. Public Util. Comm. of Ohio* (1976), 46 Ohio St.2d 105, 110, 346 N.E.2d 778, 782, citing *Carey v. Kemper* (1887), 45 Ohio St. 93, 11 N.E. 130 ("The judgment is given legal effect when it is executed by the lower tribunal, and the judgment as rendered is that of the tribunal to which the cause had been remanded").[3] See, also, *Hunt v. Westlake City School Dist. Bd. of Edn.* (1996), 114 Ohio App.3d 563, 568, 683 N.E.2d 803, 807 (holding that a special mandate to the court of common pleas to carry a judgment into execution affords jurisdiction to enforce the judgment of the appellate court). The judgment that has been entered herein is that Ohio's system of school funding is unconstitutional, and the Court thus has the authority to require that appropriate plans are in place to accomplish the "complete systematic overhaul" required by *DeRolph I*, *DeRolph II*, and *DeRolph IV*. *DeRolph v. State*, 97 Ohio St.3d at 435.

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[3] The absence of the term "remand" in *DeRolph IV* has no bearing on this Court's authority to enforce the judgment. In *DeRolph I*, the Supreme Court used the term in connection with its establishment of a unique protocol, involving a stay of the Supreme Court's judgment, a further hearing on the merits in this Court, and a subsequent direct appeal to the Supreme Court. By comparison, at this juncture, no special instructions from the Supreme Court are necessary or appropriate. The unconstitutionality of the school funding system has been conclusively determined by the Supreme Court, no stay was issued, and the judgment is presently effective and enforceable. The Mandate expressly directs this Court to execute that judgment, and the Court now has the duty to use its inherent enforcement authority to do so.

The Court not only has the authority – that is, jurisdiction – to enforce a remedy; it also has a *duty* to do so. When a mandate from a superior court to an inferior court is presented, the inferior court has no discretion to obey or refuse, but must proceed in accordance with the mandate. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 462 N.E.2d 410. See, also, *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343, 345 ("A lower court has no discretion, absent extraordinary circumstances, to disregard the mandate of a superior court in a prior appeal in the same case"); Ohio Jurisprudence 3d (1979, Supp.2002), Appellate Review, Section 616. Consequently, this Court has no discretion but to "proceed without delay" to carry the Supreme Court's judgment into execution. *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*)

This Court's inherent authority to enforce a remedy thus derives additional vitality from the Supreme Court's mandate, which expressly requires the Court to carry the judgment into execution. As the judgment itself declares the current school funding system unconstitutional, the mandate necessarily embraces the authority of this Court to oversee the State's progress toward remedying the underlying constitutional infirmities. See *International Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675 ("We agree that the trial court may not alter or disobey the mandate from an appellate court. We do not agree that the trial court may not take additional action in the case not specifically authorized by the mandate").

As the Supreme Court made clear in *DeRolph IV*, "the General Assembly has not focused on the core constitutional directive of *DeRolph I*: 'a complete systematic overhaul' of the school funding system." *DeRolph v. State*, 97 Ohio St.3d at 435, citing *DeRolph v. State*, 78 Ohio St.3d at 212. It is therefore both necessary and appropriate at this time for the Court to exercise its jurisdiction to require the State to articulate its plan of action for remedying what the Supreme Court has deemed – in no uncertain terms – to be an unconstitutional system of school funding.

III. Without The Oversight Of This Court, Plaintiffs Will Be Denied a Remedy.

Throughout the twelve-year history of this case, the State has steadfastly refused meaningful steps toward compliance with the directives of the courts. Since July 1, 1994, there have been *two* decisions of this Court and *four* decisions of the Ohio Supreme Court, all holding that Ohio does not have a constitutional school funding system. Most recently, the Supreme Court in *DeRolph IV* ruled unequivocally that the current funding system "*is unconstitutional.*" *DeRolph v. State*, 97 Ohio St.3d at 435.

It is a longstanding theorem of jurisprudence that "an unconstitutional act is not a law, but a nullity." *Thomas v. State ex rel. Gilbert* (1907), 76 Ohio St. 341, 361, 81 N.E. 437, 439. Accordingly, the former statutory framework for the distribution of state funds for public education *no longer exists*, having been declared unconstitutional, with finality, in *DeRolph IV*. In these circumstances, Plaintiffs not only continue to suffer under an indisputably unconstitutional

system of public education, but they also now are at risk of not having *any* system of public education. Unlike the Supreme Court's previous declarations of unconstitutionality, this one contained *no stay of execution*, and, consistent with the absence of a stay, the mandate to this Court has directed the Court "to proceed without delay to carry the [Supreme Court's] judgment in this cause into execution." *DeRolph v. State*, Case No. 99-570 (mandate of the Ohio Supreme Court). (*Exhibit A.*)

The State's cavalier disregard of the Supreme Court's decisions – together with its seeming lack of concern for the impending collapse of the system of public education in Ohio – underscores the fact that, without judicial oversight, no remedy will be forthcoming in this case. Unbelievably, rather than commencing a good faith effort to comply with the orders of the Supreme Court, the State is now considering *cutting* the already-inadequate funds for education and seeking to balance the State's budget on the backs of its school districts.

This Motion does not ask the Court to intrude into the legislative process. But fundamental principles of jurisprudence establish both the right and the obligation of the judiciary to serve as the guardian of constitutional rights. As the Supreme Court has cautioned, judicial abdication in the face of legislative resistance would result in the judiciary becoming a "[w]illing participant in divesting the courts of judicial power and a coconspirator in the abdication of fundamental individual rights and liberties contained in our Constitution." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 501, 715 N.E.2d

1062, 1102. Moreover, as that court confirmed in *DeRolph II*, it is not sufficient for the judiciary merely to declare constitutional rights without also ensuring that remedial action ensues.

> [W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If did not, then the power to find a particular act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy.

DeRolph v. State, 89 Ohio St.3d at 12. (Emphasis in original.)

In the present case, as the Supreme Court warned in *DeRolph II*, the now-final declaration of Plaintiffs' rights will be a nullity without orders reasonably designed to bring about enforcement of those rights. This Court has already issued such orders, recognizing judicial monitoring as essential to assure compliance. Today, all Plaintiffs ask is that the Court begin the monitoring process by convening a conference and requiring the State to advise the Court and Plaintiffs as to when and how it intends to comply with *DeRolph IV* and the 1999 orders of this Court. This is an exceedingly modest request, especially in light of the fulsome scope of the remedy to which Plaintiffs are entitled. And given the *absolute obligation* of the State to comply with the directives of the

Supreme Court, it is a request that adds little, if anything, to the obligations already borne by the State. Otherwise stated, this is hardly a burdensome request; to the extent that the State intends in good faith to respond to *DeRolph IV*, there is no reason for the State to oppose it.

Should the Court decline, however, there is little doubt that the concerns of Delegate Curry – that the constitutional guarantee of a thorough and efficient system of public education could become "totally inefficient and powerless" – will be realized. *DeRolph v. State*, 97 Ohio St.3d at 436. Our Constitution will be rendered a meaningless historical document and our judicial system a mere "paper tiger." The twelve years spent litigating the rights of Ohio's school children will amount to little more than an academic exercise if, at the end, the State is free to disregard the consequent declarations of rights by the highest court of the state.

It now falls to this Court to determine whether the rule of law has meaning – for Plaintiffs and Ohio's 1.8 million public school pupils, as well as for future plaintiffs seeking declaratory judgments against the State. In the process, the Court will also signal whether those charged with making and enforcing the laws of Ohio must live within the constitution or are free to ignore it with impunity.

Conclusion

This matter is now before the Court pursuant to the Court's jurisdiction to enforce both its own prior Orders and those of the Supreme Court. Plaintiffs ask the Court to commence its exercise of its enforcement authority by

scheduling a compliance conference at the earliest possible time, in order to ensure that the State initiates, without further delay, the process of formulating a school funding system that satisfies the mandates of the Supreme Court.

Respectfully submitted,

/s/_____
Nicholas A. Pittner (0023159)
John F. Birath, Jr. (0022024)
Sue W. Yount (0034514)
Quintin F. Lindsmith (0018327)
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Telephone: (614) 227-2300
Facsimile: (614) 227-2390
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Motion For Compliance Conference has been sent by regular U.S. Mail, postage prepaid, on this _____ day of March, 2003, to Roger F. Carroll, Assistant Attorney General, Office of the Attorney General of the State of Ohio, 30 East Broad Street, 16th Floor, Columbus, Ohio 43215-3428.

/s/_____
Nicholas A. Pittner

*** Exhibits A through D attached to this motion have not been included for purposes of this appendix.

APPENDIX J

**IN THE COMMON PLEAS COURT,
PERRY COUNTY, OHIO**

Case No. 22043

Filed July 1, 1994

DALE R. DeROLPH, Parent and Next Friend of NATHAN DeROLPH, et al.,	)
PLAINTIFFS	)
v.	)
STATE OF OHIO, et al.,	)
DEFENDANTS.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND MEMORANDUM

*** This document has been excerpted for purposes of this appendix. Only the relevant portion of the document is reproduced.

V. THE COURT HEREBY ORDERS AND DECLARES:

1. The responsibility to afford school children the Constitutional right to receive the benefits of a thorough and efficient system of public schools devolves upon the General Assembly by the force of the Constitution's command, and not upon the school districts, which are creatures of the General Assembly.

2. Since the duty to make provision for a thorough and efficient system is the State's duty, the failure of the Plaintiff school districts to carry out that function is a failure of the State to carry out the commands of the Ohio Constitution in violation of Section 2 of Article VI and Section 26 of Article II.

3. The State may not constitutionally delegate the responsibility for financing education to the school districts.

4. Public education is a fundamental right in the State of Ohio, guaranteed by the Constitution of the State of Ohio.

5. The current system of funding public elementary and secondary education is unconstitutional as applied to plaintiffs and others. The specific provisions included within this determination are:

a. R.C. § 133.301--Additional borrowing authority of school districts. This provision, to the extent

that it is utilized to require school districts to borrow funds from private lenders to pay obligations that are, in fact, obligations of the State, represents a violation of §§ 1 and 3 of Article VIII, as well as § 4 of Article XII, which requires the State to raise sufficient revenue to pay its expenses.

b. R.C. § 319.301--Calculation of tax reduction percentages for carryover property in each class. This statute directly contributes to the harm complained of in this action. The limitations of this section far exceed the tax reduction requirements of § 2a of Article XII of the Ohio Constitution. The excessive reliance on local property taxes as a means of funding education in Ohio directly contributes to the harm inflicted on the Plaintiffs in this case.

c. R.C. §§3313.483, 3313.487, 3313.488, 3313.4810 and 3313.4811--Collectively, the emergency school assistance loan provisions. These statutes not only contribute to the Constitutional deprivations complained of, they also represent a violation of 1 and 3 of Article VIII, as well as § 4 of Article XII, which requires the State to raise sufficient revenue to pay its expenses.

d. Various provisions of R.C. Chapter 3317:
§ 3317.01--School foundation program; eligibility; administration of funds; § 3317.02--Definitions;

equalization factors (foundation program); § 3317.022--Computation of state aid distribution by districts; § 3317.023--Adjustments to basic state aid; § 3317.024--Distribution of moneys appropriated for specific programs; § 3317.04--Minimum amounts of payments to districts; and § 3317.13--Salary schedule and job classification for teachers. These statutes individually and together operate to deprive Ohio's school children of an equal opportunity to a high quality education as mandated by the Constitution and Ohio statutes. The entire school foundation program as it is currently enacted and applied is unconstitutional. School children, both handicapped and non-handicapped, are denied an adequate education because of the funding system in place.

e. R.C. Chapter 3318--Classroom Facilities Act. This chapter contributes to the constitutional deprivations demonstrated in this case, not because of the funds provided under the act but because of the extent to which the legislature has failed to provide sufficient funds to serve the facilities needs of Ohio's public schools.

f. R.C. §§ 3317.05, 3317.051 and 3317.052--Unit funding for mandated programs. These provisions are unconstitutional in that the State has mandated programs and services for both handicapped and vocational pupils, but funded those programs in such a fashion as to cause substantial inequity among the pupils receiving these programs and

dilution of funds available for the education of other pupils. Handicapped children are denied the equal protection of the Ohio Constitution with respect to the provision of a free appropriate education that meets the requirements of federal and state provisions.

6. That the Defendant State of Ohio is directed forthwith to provide for and fund a system of funding public elementary and secondary education in compliance with the Ohio Constitution.

7. A Constitutionally acceptable system of school funding must:

a. Recognize that the State has ultimate responsibility for the establishment, organization, and maintenance of the system of public schools in the State.

b. Ensure that the State provide for a thorough and efficient system of public schools throughout the geographic area of the State. Such a system would include facilities in good repair and supplies, materials and funds necessary to maintain these facilities in a safe manner applicable with all local, state, and federal requirements.

c. Provide to all school children throughout the State, including handicapped children, regardless of where they live, free schools on an equal basis, which includes equitable and adequate educational

opportunities, educational materials, equipment and supplies to all children. Adequate educational opportunities shall consist of the following:

1. Sufficient oral and written communication skills to function socially and economically in Ohio and globally;

2. Sufficient mathematic and scientific skills to function as a contributing citizen to the economy of Ohio and globally;

3. Sufficient knowledge of economic, social and political systems, generally, and of the history, policies, and social structure of Ohio and the nation and enable the student to make informed decisions;

4. Sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;

5. Sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;

6. Sufficient understanding of the arts to enable each student to appreciate his or her

cultural heritage and the cultural heritages of others;

7. Sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life intelligently;

8. Sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Ohio, in surrounding states, across the nation, and throughout the world, in academics or in the job market;

9. Sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full potential;

10. Sufficient facilities, equipment, supplies and instruction to enable both female and male students to compete equally within their own schools as well as schools across the State of Ohio and worldwide in both academic and extracurricular activities;

11. Sufficient monitoring by the General Assembly to assure that this State's common schools are being operated

without there being mismanagement, waste or misuse of funds; and

12. Sufficient facilities for each school district across the State that are adequate for instruction, safe, sanitary and conducive to providing a proper education as outlined by the above-related criteria.

8. The Superintendent of Public Instruction and the State Board of Education shall forthwith prepare a report setting forth proposals for the elimination of wealth based disparities among the school districts within the State of Ohio. Said report shall be presented to the Ohio Legislature upon completion.

9. The Superintendent of Public Instruction and the State Board of Education shall forthwith prepare a report after the legislative sessions are completed for calendar year 1994 and 1995 setting forth the steps being taken to eliminate the wealth based disparities among the school districts within the State of Ohio. The report shall state what action has been taken and what effect or anticipated effect such action will have on the school districts of this State.

10. The State Board of Education shall provide a summary of all proposals and reports required by this Order to the Superintendent and school board presidents of the Plaintiff School Districts as well as all school districts throughout this State.

11. This Court does not deem this case a proper one in which to retain ongoing jurisdiction. It is this Court's desire to retain jurisdiction for a period of time to assure this Order is followed and steps are being taken to resolve the matters involved in the case at bar. The progress of the State to resolve these issues shall be monitored upon a timely motion by either party or by a motion of this Court.

12. The Plaintiffs are awarded costs in this matter including reasonable attorneys fees.

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No. 03-245

In The Supreme Court Of The United States

DALE R. DEROLPH, et al.,
Petitioners,

v.

STATE EX REL. STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT STATE OF OHIO IN OPPOSITION TO THE PETITION FOR CERTIORARI

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INTRODUCTION

After litigating their state law claim for twelve years in state courts, Petitioners now attempt to make it a federal case—but their effort fails. Indeed, this case lies squarely at the crossroads of two core areas of state law concern: (1) how a State will implement its state constitutional guarantee to a thorough and efficient educational system, and (2) the scope of a state supreme court's supervisory authority over the State's lower courts. While it surprising enough that Petitioners belatedly claim a federal issue here at all, what is more surprising is the specific federal claim that they try: after successfully litigating their state constitutional claim for over a decade, including four separate trips to the Ohio Supreme Court, Petitioners now claim that are being denied access to the courts in violation of the federal constitution. But for several reasons, Petitioners fail to properly invoke this Court's federal jurisdiction at all, and in any case, they do not present any questions worthy of this Court's review.

First, the petition does not present any legitimate questions of federal law at all, let alone any that justify certiorari. This petition was not filed as an appeal from the decade-long Ohio school funding case, *DeRolph v. State*, but was filed as an appeal from an independent state-law case, *State ex rel. State v. Lewis*, that arose as satellite litigation after the school-funding case ended. As detailed below, Petitioners sought to revive the closed *DeRolph* case by filing new papers in the trial court that originally heard the case. The State responded with an original action in Ohio Supreme Court, in which the State sought—and obtained—a "writ of prohibition," which instructed the lower court not to entertain further proceedings in *DeRolph*, as that case was closed. The *Lewis* decision, then, involved the quintessentially state-law questions involved in issuing such state-law writs, and ultimately is about a state supreme court's power to oversee lower state courts, decidedly not an area of federal concern.

Moreover, in granting prohibition, the Ohio Supreme Court was merely applying and enforcing its own mandate from *DeRolph*, which had ended months earlier. In litigating the prohibition question in *Lewis,* no party even suggested that federal law was implicated, nor did the court below consider or rely upon federal law in reaching its result. This is unsurprising, as the underlying *DeRolph* case itself did not involve federal issues. In *DeRolph*, Petitioners successfully argued that Ohio's school funding system did not comply with the standard prescribed by the *Ohio* constitution. That is, the state supreme court construed the state constitution and declared rights and obligations under it, a classic matter of state law. In short, neither the *Lewis* case below, nor the underlying *DeRolph* case, involved any genuine questions of federal law, and that leaves nothing for this Court to review. The petition should thus be denied.

In seeking to transmute their state-law claims into questions of federal law, Petitioners dutifully intone the incantations well-known to hopeful legal alchemists: they assert vaguely-defined "due process" and "equal protection" claims predicated on alleged denial of access to state courts. But as noted above, Petitioners successfully litigated their state-law claims in the state courts. They had their day in court; indeed, they had their decade in court. Nor can they complain that their claims were not fairly heard during that process, as they *won repeatedly*. Indeed, in the last of four separate Ohio Supreme Court decisions in their favor, the plurality opinion reiterated that "the current school-funding system is unconstitutional," and specifically stated that "we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I, DeRolph II,* and the accompanying concurrences." *DeRolph v. State*, 780 N.E.2d 529, 530 (2002);. Pet. App. 19a (opinion per Pfeiffer, J.). The last thing they can now plausibly complain of is a denial of due

process, or a denial of equal protection in their access to Ohio courts. In short, the *DeRolph* plaintiffs received a hearing, a favorable decision, and a remedial directive. Federal due process and equal protection impose no requirements beyond the hearing and remedy the Ohio Supreme Court has already afforded.

Moreover, even if the U.S. Constitution did require the State to provide specific remedies when state courts declare rights under state constitutions, all such federal questions should have been timely presented to the Ohio Supreme Court—but they were not. This Court's precedents call for denial of certiorari where independent state-law grounds support a state court decision, where the state court made no ruling on the federal question, and where the federal question was not properly presented to the state court for consideration. All of those conditions apply here, and the petition should thus be denied.

Finally, even if Petitioners could somehow clear all of the above jurisdictional and prudential obstacles to granting certiorari, the Petition should still be denied, as the merits of the question presented do not raise any issue worthy of the Court's review. First, the question framed by Petitioners is not even presented in this case, because nothing in the decision below broadly denies access to Ohio courts. That is, the decision below expressly acknowledges that additional litigation regarding school funding would likely arise; it merely holds that *the DeRolph case* is over. Second, the expansive view of due process and equal protection articulated in the Petition asks this Court to federalize the remedies any time a state court recognizes a state constitutional law right. This theory so radically undermines the Court's traditional approach to such state-law cases—which confirm the federal constitutional principle that States retain an inviolable realm of sovereignty to the States—that

even reviewing the case would draw the Court far deeper into state sovereign territory than it has ever trod. For all of these reasons, the petition should be denied.

STATEMENT

Petitioners' procedural history of the case is largely correct in what it does say, but it is more notable for what it omits. Consequently, Respondents' Statement does not restate the entire case history, but focuses on Petitioners' omissions. While the Statement is presented chronologically, four points emerge from the history of the *DeRolph* and *Lewis* cases. First, the Ohio Supreme Court has repeatedly held that it would not order injunctive relief dictating to the political branches the precise formulation for school funding. Rather, the Court limited itself to declaratory relief, issuing statements at each stage indicating which aspects of the educational system met, or failed to meet, Ohio's constitutional standard, an approach that left the specifics of any school-funding system to be decided, in the first instance, by the Ohio legislature. Second, as a corollary of the first, the court has consistently instructed the trial court that it, too, should not order specific injunctive relief, but should limit itself to declaring the validity, or invalidity, of Ohio's educational statutes and programs. Third, the court's last *DeRolph* decision, called "*DeRolph IV*," left no doubt that the *DeRolph* case itself was over, and that any further school-funding litigation would occur in a new case, if any. Finally, the court repeatedly credited the State for its massive efforts to improve education in Ohio, even as it repeatedly said that more work should be done; the court never adopted Petitioners' view that nothing has been done.

These four principles are interwoven in the court's five main opinions—four in *DeRolph* and one in *Lewis*—and in ancillary orders, as follows:

DeRolph I. In *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) ("*DeRolph I*"), the Ohio Supreme Court held that the then-existing system of school funding violated the "thorough and efficient clause." However, striking a theme that would continue throughout the remainder of the litigation, the Ohio Supreme Court refused to impose any specific injunctive relief against the State. "Although we have found the school financing system unconstitutional, we do not instruct the General Assembly as to the specifics of the legislation it should enact." *Id.* at 747. The Court recognized that "the proper scope of our review is limited to determining whether the current system meets constitutional muster. We refuse to encroach upon the purely legislative function of what the new legislation will be." *Id.* at 747 n.9. *See also DeRolph v. State*, 728 N.E.2d 993, 1002 (Ohio 2000) ("*DeRolph II*") ("[T]his court in *DeRolph I* did not require a specific funding scheme, and did not instruct the General Assembly as to what legislation should be enacted, leaving it to the General Assembly to determine the specifics of the remedial legislation.").

Several procedural steps between *DeRolph I* and *DeRolph II* not only confirmed that the court refused to order specific injunctive relief, but also established that the trial court was not to do so, either. First, the court stayed the effect of *DeRolph I*, giving the General Assembly time to develop a constitutional school-funding system. Second, the court then sent the case back to the trial court to await that legislative action and review the validity of the new system, specifically providing that the case was "*remanded to the trial court* with directions to enter judgment consistent with" the Ohio Supreme Court's opinion. Judgment Entry, March 24, 1997 (emphasis added). The remand further provided that the trial court was "to retain jurisdiction until legislation is enacted . . . taking such action as may be necessary to ensure conformity" with *DeRolph I*. When the State asked the court to reconsider the decision to remand,

seeking closer supervision directly by the Ohio Supreme Court, the court said no, stating that its role, and that of the trial court, would be limited to later reviewing the State's efforts:

> Given the separate powers entrusted to the three coordinate branches of government, both this court and the trial court recognize that *it is not the function of the judiciary to supervise or participate* in the legislative and executive process.

DeRolph v. State, 678 N.E.2d 886, 887 (Ohio 1997) (emphasis added).

The court soon confirmed the restraints on the trial court in two ways. First, while the case was pending before the trial court on remand, the *DeRolph* Plaintiffs, in May 1997, asked the trial court to impose a compliance schedule, including monthly compliance conferences. The trial court asked the Ohio Supreme Court for guidance, and that court rejected the idea of any such compliance oversight, and ordered the trial court to deny Plaintiffs' motion. *DeRolph v. State*, 681 N.E.2d 424, 424 (Ohio 1997).

Second, two years later, when the trial court eventually did order specific compliance, the Ohio Supreme Court said no. The trial court found that, even with certain newly-enacted legislation, the school funding system remained unconstitutional. *DeRolph v. State*, 712 N.E.2d 125 (Ohio C.P. 1999). Seeking to enforce that declaration with injunctive relief, the trial court ordered the Superintendent of Public Instruction and the State Board of Education to "forthwith prepare a report setting forth proposals complying with the Order of this Court and the directives of the Ohio Supreme Court," and it mandated yearly reports, contemplating ongoing close oversight of educational policy.

Id. at 297. But the Ohio Supreme Court stayed this order pending appeal, with three justices questioning whether the trial court had any authority to enter it. *DeRolph v. State*, 709 N.E.2d 1215 (Ohio 1999).

DeRolph II. In its second major opinion, the Ohio Supreme Court again found the funding system unconstitutional, but it again completely rejected the injunctive elements of Plaintiffs' proposed remedy. As the court noted, Plaintiffs asked the court to "specify what programs and services must be provided to children at every level, in order to define what level of educational opportunities must be made available," and to "issue an interim funding order that, among other things, requires the state to fund the foundation level at $5,051 per pupil, updated for inflation from FY99, and also requires the state to fund school facilities at a minimum level of $1 billion for each fiscal year." *DeRolph v. State*, 728 N.E.2d 993, 998 (Ohio 2000) ("*DeRolph II*"). But the court would not dictate such results, again leaving it to the legislature to craft the specifics of a remedy. "[W]e conceivably could simply order, as plaintiffs request, that the foundation amount be set in excess of $5,000 per pupil for FY00, and order the General Assembly to fund that amount .... That degree of involvement in fashioning a remedy in this case is not, nor should ever be, how we perceive our role. Our role, as we have declared in past cases, is to decide issues of constitutionality—not to legislate, as some may believe." *Id.* at 1003.

The Ohio Supreme Court then continued the matter until June 15, 2001, giving the State another year to complete its remedy. *Id.* And when Plaintiffs tried, just six months later, to get the court to order more specific relief immediately, the court again said no. *See DeRolph v. State*, 741 N.E.2d 533, 533 (Ohio 2000) (rejecting request for court oversight of the State's efforts, including a request for a

compliance schedule and "for an order requiring [the State] to pay the costs of the unfunded mandates, to file a master plan, and to file subsequent progress reports.").

Notably, in *DeRolph II*, the court not only rejected pleas for injunctive relief, but it also rejected the Plaintiffs' continued claim that the State's efforts so far amounted to nothing. The court expressly recognized the State's "past and present efforts," as a "good faith attempt to comply with the constitutional requirements." 728 N.E.2d 993 at 1020.

DeRolph III. In *DeRolph III*, the Ohio Supreme Court finally took tentative steps toward ordering specific relief, but it soon stepped back from that approach. The court again found that the school funding system fell short of the mark, and it ordered the State to implement specific changes that would, in its view, "make the new plan constitutional." *DeRolph v. State*, 754 N.E.2d 1184, 1200 (Ohio 2001) ("*DeRolph III*"). But the court did not plan to oversee that implementation within the *DeRolph* litigation. Rather, it intended to issue those instructions as parting words and to close the case, noting that it had "no reason to doubt [the State's] good faith," and concluding that there was "no reason to retain jurisdiction" over the case. *Id.*

But even those parting instructions were put on hold, as the State immediately sought reconsideration of certain aspects of that decision, pointing to problems with the court's directives—and the court put its *DeRolph III* order on hold. Instead, the court ordered the parties to engage in mediation, *DeRolph v. State*, 758 N.E.2d 1113 (Ohio 2001), and when that effort proved unsuccessful, the court did not reinstate its *DeRolph III* order, but it instead returned the case to the court's active docket for a decision on the State's reconsideration motion.

DeRolph IV. In this context—reconsideration of a *DeRolph III* decision that had already indicated an intent to close the case—the court issued its *DeRolph IV* decision on December 11, 2002. *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) ("*DeRolph IV*"); Pet. App. 17a. The court expressly vacated its *DeRolph III* decision, thus repealing its sole attempt to order specific relief. Pet. App. at 19a. But the court, although declaring that Ohio's school-funding system remained unconstitutional, *id.*, did not order any other specific relief instead.

While the Court's plurality opinion neither retained jurisdiction, nor remanded the matter back to the trial court as it had in *DeRolph I*, several Justices, in both concurrences and dissents, left no doubt that the majority of the court agreed that the *DeRolph* case was over, and that any future school-funding litigation would be in a new case. First, in her concurring opinion, Justice Resnick predicted, "further litigation will be forthcoming in the area of school funding, even though it apparently will be under a name other than *DeRolph*." Pet. App. at 25a (Resnick, J., concurring). Second, Justice Stratton, in that portion of her opinion in which she concurred with the majority, explained her view that the case was over:

> While I do not agree with [the majority's] conclusion, I do believe that it is proper for the *majority to dismiss the case* once it has reached a finding of unconstitutionality . . . . In no case other than *DeRolph* have we retained jurisdiction once we have made a finding of unconstitutionality. We are not charged by the Constitution with fashioning new legislation that we believe meets the constitutional mandate. *That role is assigned only to the legislature, and to the legislature has that role now been properly returned.*

Pet. App. at 29a (emphasis added) (Stratton, J., concurring in part and dissenting in part). Third, Chief Justice Moyer, in his dissent, also expressed the view that "[the majority] implicitly declares this case concluded . . . ." Pet. App. at 32a (Moyer, C.J., dissenting). Chief Justice Moyer also predicted, as Justice Resnick did, that although *DeRolph* was over, future school-funding cases were likely. Pet. App. at 31a ("The issues will almost certainly again come before this, or another, Ohio court."). Finally, then-Justice Cook reiterated her view, expressed throughout the *DeRolph* litigation, that the case should be dismissed without any further proceedings. Pet. App. at 46a (Cook, J., dissenting).

These opinions should have left no doubt that the case was over, but if any doubt somehow remained, then it was eliminated by the court's final mandate in *DeRolph IV*, which did not contain any remand language—in sharp contrast to the *DeRolph I* judgment entry quoted above. The *DeRolph IV* mandate merely said, "IT IS ORDERED by the court that, consistent with the opinion rendered herein [780 N.E.2d 529], the decision entered in this case on September 6, 2001, be, and hereby is, vacated an that this court's decisions in [*DeRolph I* and *DeRolph II*] are the law of the case and that the current school-funding system is unconstitutional." *DeRolph v. State*, 780 N.E.2d 282 (Ohio 2002); Pet. App. at 49a-50a. The mandate ordered the trial court to carry the *DeRolph IV* judgment "into execution," but again, the mandate did not issue remand instructions, as in *DeRolph I*. *Id.*; Judgment Entry, Dec. 11, 2002; Pet. App. at 47a-48a.

State ex rel. State v. Lewis. About three months after the December 2002 decision in *DeRolph IV*—on March 4, 2003—the *DeRolph* Plaintiffs filed a "Motion to Schedule Compliance Conference" in the trial court. Pet. App. at 61a *et seq*. Because the *DeRolph IV* decision had not remanded the case back to the trial court, the State acted immediately, and on March 7, 2003, it filed an original action in the Ohio

Supreme Court, seeking a writ of prohibition against the trial judge, Linton D. Lewis, Jr., and the trial court, on the ground that the trial court had "a patent and unambiguous lack of jurisdiction." *See State ex rel. Goldberg v. Mahoning Cty. Probate Court*, 753 N.E.2d 192 (Ohio 2001). The *DeRolph* Plaintiffs were allowed to intervene as respondents in the prohibition case. They argued, as they did in their "Motion for Compliance Conference" in the trial court, that the trial court's 1999 remedial order was somehow reactivated by the *DeRolph IV* decision, or, alternatively, that the trial court had jurisdiction based upon the *DeRolph IV* mandate.

On May 16, 2003, the Ohio Supreme Court rejected the idea that *DeRolph* was still an open case, so it granted the writ of prohibition and ordered the trial court to deny the *DeRolph* Plaintiffs' attempt to revive the case. *State ex rel. State v. Lewis*, 789 N.E.2d 195 (Ohio 2003); Pet. App. at 1a *et seq.* Justice Stratton, writing for herself and Justice Pfeifer, again noted the court's unwavering view that "supervision of the legislative process by the courts" would be rejected. Pet. App. at 3a.

The court not only rejected the *DeRolph* Plaintiffs' particular arguments for continuing *DeRolph*—that the trial court's 1999 remedial order was somehow revived, or that the *DeRolph IV* mandate authorized more litigation—but it more broadly reminded the parties that it had repeatedly rejected the option of specific injunctive relief. The court noted that "by repeatedly denying the *DeRolph* plaintiffs' requests for comparable remedial relief throughout this litigation, we intended to preclude this relief." Pet. App. at 9a.

The court also stressed that its prohibition decision in *Lewis* merely confirmed what it had already said in *DeRolph IV*, noting that "a review of the various opinions in *DeRolph IV* supports [the conclusion] that no further jurisdiction over

[*DeRolph*] would be exercised, whether by this *or any other court*." Pet. App. at 12a (emphasis in original). According to the court, "if we had intended a remand for further proceedings in this litigation, we would have expressly provided for that action. *See DeRolph I*, [677 N.E.2d at 747]. By contrast, we did not specify any remand in *DeRolph IV*." Pet. App. at 11a.

It is this decision—the Ohio Supreme Court's grant of prohibition in *Lewis*—that the *DeRolph* Plaintiffs, now Petitioners, ask this Court to review.

REASONS FOR DENYING THE WRIT

A. The petition does not present any federal question that warrants the Court's review.

The petition should be denied because it does not raise any federal questions that warrant the Court's review. First, it is important to clarify precisely what the Ohio Supreme Court did that allegedly violated Petitioners' federal rights, as the Petition is vague on that score, and each possible theory of Petitioners' claims yields a different analysis, even though no theory warrants review. Second, Petitioners do not truly demonstrate that any federal issue exists at all, and even if some theory of theirs ekes out a claim to federal jurisdiction, such claims were not pressed or passed upon below. And, even if such claims were preserved, by the thread of a passing reference to "substantive due process" in one paper filed below, those claims do not warrant review under the Court's traditional certiorari standards. Finally, the Petition is, in fact, a poorly disguised attempt to get review of the underlying decision in *DeRolph IV* itself by improperly using the new vehicle of this prohibition action to reset the certiorari clock after the true deadline passed.

1. The petition does not precisely indicate how federal law was allegedly violated here, but such precision is essential to understanding the petition and its flaws.

As an initial matter, it is important to note that Petitioners are not quite clear in stating precisely *what it was that the Ohio Supreme Court did* that triggered the alleged federal constitutional violations here, and the answer to that question affects both the jurisdictional analysis and the standard certworthiness analysis. Petitioners do itemize their claims in terms of the alleged federal issues, citing procedural due process, *see* Pet. at 16, 22, substantive due process, *id.* at 17, and equal protection. *Id.* at 23. But Petitioners do not pin down *what aspect* of the Ohio Supreme Court's action allegedly violated those rights, nor what this Court could or should do to remedy the alleged violations. Thus, before addressing the petition's lack of federal jurisdiction or other barriers to review, it is useful to try to narrow down Petitioners' vague and overlapping complaints, as each theory of Petitioners case implicates a different, and conclusive, barrier to review.

The narrowest form of Petitioners' claim is that they object *only* to the writ of prohibition granted in *Lewis*. Under that view, the harm is rooted solely in the court's use of prohibition as the vehicle to end the *DeRolph* case, as Petitioners protest that this step unfairly—and unconstitutionally—cut off the trial court's ability to grant them further relief. *See id.* at 16.

In contrast to the narrowest *Lewis*/prohibition objection, most parts of the Petition point to a broader quarrel with the Ohio Supreme Court's decision to end the *DeRolph* case, regardless of whether that closure occurred through prohibition or through a final termination of *DeRolph* on direct review. *See id.* at 22 ("the question is whether litigants

may, consistent with procedural and substantive due process, be cut off from *any remedy whatsoever* for ongoing wrongs that have already been judicially declared") (emphasis in original). This view, which might be called the "hollow victory" objection, can be further subdivided into three basic gradations, depending on what, exactly, Petitioners believe that the federal constitution required (or still requires) the Ohio Supreme Court to do here.

At a minimum, Petitioners insist that the federal Constitution required the Ohio Supreme Court to keep the *DeRolph* case open as long as the court continued to find that the school-funding system violated the Ohio Constitution. *See id.* at 10 n.7 (acknowledging that "Petitioners could commence a *new* lawsuit aimed at vindicating educational rights," but arguing that such a suit would not satisfy the right to enforce such rights in *DeRolph* itself). Under a minimal "keep *DeRolph* open" view, Petitioners would argue that federal law requires that the case be kept open, but does not require the Ohio courts to grant *any* affirmative injunctive relief beyond the restrained type of remedial orders that the Ohio Supreme Court has already issued.

While some parts of the Petition appear to stop with the "keep *DeRolph* open" argument, other parts seem to go a subtle, but perhaps important, step further. In particular, the petition suggests that federal law entitles Petitioners not only to a continuation of *DeRolph,* and to remedial orders that declare the State's duty to do more, but also entitles them to *some* unspecified "affirmative relief." In this view, federal law does not require anything specific about the *content* of that affirmative relief, but it does require that some "enforcement" accompany a remedial order. This view is suggested by the question presented, which speaks of "enforcement of a final judgment, including remedial orders, entitling Petitioners to affirmative relief," and by the Petition's many references to *enforcement* of a remedial

decree. *See, e.g.*, Pet. at 20 (referring to "expectation of an enforceable remedy"); *id.* at 20 n. 17 (urging that state courts are required to "act to enforce their own remedial decrees").

Finally, the strongest possible view of Petitioners' claim—a view that they expressly disclaim—would be that federal law not only requires state courts to grant some "affirmative relief" to enforce their orders (when an underlying state-law violation or liability is found), but that federal law actually says something about the content of that affirmative relief, perhaps to ensure that the affirmative relief is not token, but is meaningful.

The above analysis of Petitioners' claims, by focusing on the precise "harm" that Petitioners seek to remedy through the Court's review, is a useful addition to the federal-law taxonomy that Petitioners cite—*i.e.*, procedural due process, substantive due process, and equal protection—as it is hard to evaluate whether Petitioners properly raise a federal issue, let alone a certworthy one, without such precise delineation.

Once the precise contours of Petitioners' alleged federal issues is clear, however, it is similarly clear that review is not warranted under any reading of Petitioners' claims. In fact, each different version implicates different barriers to review, both jurisdictional and prudential. For example, as explained below in subsection two, Petitioners simply do not raise a federal issue if their dispute is with Ohio's procedural mechanisms, without regard to any substantive results. Conversely, but to the same effect, Petitioners do not raise a federal issue if their quarrel is with the substantive outcome of *DeRolph*, *i.e.*, with their failure to obtain the type of affirmative injunctive relief that they have always sought, as that is plainly an issue of state law as well. Separately, as explained below in subsection three, because the Petition plainly demonstrates that Petitioners do not merely quarrel with the grant of prohibition in *Lewis*, but that

they truly object to the outcome of *DeRolph IV*, the petition should be denied for the simple reason that Petitioners did not meet the filing deadline for seeking review of *DeRolph IV*.

In short, while Petitioners have demonstrated creativity in spinning a web of claims that are hard to untangle, once the threads are separated, the Petition fails to show a need for review.

2. No federal issues are presented here, nor were any such issues properly raised below.

No one disputes that Petitioners must raise a *federal* issue to invoke the Court's jurisdiction, as no matter how important a state-law issue may be, the Court may not review purely state-law claims. *See* 28 U.S.C. 1257. Separately, even where a legitimate federal issue is presented, this Court consistently refuses to review state-court decisions if the federal issue is first raised in a petition for certiorari, or in other words, if the federal issue was "not pressed or passed upon" in the state court. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997). The complete absence of a federal issue is generally a more conclusive barrier to review, as it is jurisdictional, while the "not pressed or passed upon" rule has been described as either jurisdictional or prudential. *See id.* at 90. But Respondent State of Ohio first addresses Petitioners' failure to raise its alleged federal claims below, as that flaw is perhaps the most clear-cut of the many flaws in the Petition.

The Court has long "adhered to the rule" that, when certiorari is sought from a state court decision, the Court "will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams*, 520 U.S. at 86. This rule, sometimes called the "not

pressed or passed upon" rule, *Illinois v. Gates*, 462 U.S. 213, 219, 221 (1983), serves two main functions. First, it promotes comity with state courts by "declining to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90, citing *Webb v. Webb*, 451 U.S. 493, 500 (1981). Second, "a constellation of practical considerations" animates the rule, "chief among which is our own need for a properly developed record on appeal." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

Here, none of the alleged federal claims were passed upon below; nor were they truly pressed, as Petitioners point to only one item tying federal law to this State case—*i.e.*, a passing mention of "substantive due process" as a defense in Petitioners' answer to the complaint for prohibition—but that slim thread cannot possibly bear the weight of the Petition. Petitioners admit that "the federal constitutional questions were not expressly passed upon by the Supreme Court of Ohio," Pet. at 6, but they insist that they "timely and properly raised federal constitutional questions at their first and only opportunity to respond to the writ of prohibition that is the subject of this petition for writ of certiorari." *Id.* Petitioners cite, as support, the answer that they filed as intervening defendants in *Lewis*. *Id.* That answer did indeed mention substantive due process, as follows:

> Divesting the Trial Court of authority to provide a remedy for the constitutional wrongs declared in [*DeRolph IV*] would violate the *substantive due process* rights of the *DeRolph* Plaintiffs and Ohio's public school children in contravention of the United Sates and Ohio Constitutions.

Pet. App. 58a (emphasis added). Surely that slight reference is not enough.

First, Petitioners do not explain, nor could they, how this mention of "substantive due process" entitles them to now raise theories of procedural due process and equal protection. Indeed, Petitioners do not even candidly acknowledge, or try to overcome, this flaw regarding the equal protection and procedural due process theories. Instead, Petitioners glide over these crucial problems by saying generically that they "raised federal constitutional questions," Pet. at 6, and by paraphrasing the critical line in the answer as having raised "due process," without specifying that they narrowed themselves to only *substantive* due process in their answer in *Lewis*.

Second, while Petitioners lean entirely on the *answer* filed in *Lewis*, which was a five-page paper that mentioned substantive due process only once, they fail to note that they also filed a twenty-eight-page *brief* in the case, in which the magic words "due process" (as well as "equal protection") do not appear at all. That brief, although titled a Motion to Intervene, devotes only four pages to explaining why intervention should be granted, while the remaining twenty-four pages fully explain Petitioners' position on the merits of why prohibition should not be granted, and why the *DeRolph* case is still alive. In that *Lewis* brief, Petitioners' ultimate argument was that it would be wrong to end the *DeRolph* case with a declaration in their favor without a corresponding remedy, enforced by continued judicial oversight and injunctive relief. That is, their argument was already cast, at its analytical core, exactly as it is now, with one crucial, and fatal difference: it was never argued as a matter of federal constitutional law.

Moreover, Petitioners' claim that they raised federal issues at the "earliest opportunity" (Pet. at 6) is surely incorrect if their case centers on the idea that the Ohio Supreme Court may not close the *DeRolph* case on an

"unremedied" note, as opposed to the narrower notion that Petitioners object only to the use of the prohibition device to achieve that end. That is, if federal law somehow prevents that result—though it does not—then the Ohio Supreme Court violated Petitioners' federal rights in *DeRolph IV*, if the claim centers on the closure of the case. And if Petitioners object not only to *DeRolph's* closure, but to the issuance of remedial declarations without any "affirmative relief" to enforce the declarations, that "problem" had occurred years before in *DeRolph II* and in the ancillary litigation between *DeRolph I* and *II*, as the court repeatedly told the Petitioners that it would not order the type of injunctive relief and "compliance" oversight that Petitioners sought. *See* Statement, above, at pp. 5-8.

In sum, Petitioners' federal-law theories of equal protection and procedural due process were not pressed at all, and if "pressed" means anything more than a whispered aside in the *Lewis* answer—as it must—then the substantive due process theory was not pressed, either.

In addition, even if the Court were to completely overlook the fact that the federal claims were not pressed or passed upon below, those claims do not actually raise a federal issue, and in any case, they do not raise a certworthy federal issue. These shortfalls in the Petition are especially highlighted if the claims are analyzed, again, not just in terms of due process or equal protection, but from the standpoint of asking precisely *what aspect* of the Ohio Supreme Court's action allegedly violated Petitioners' federal rights, and asking what, if Petitioners were right, this Court could or should do to remedy the alleged violations.

As noted above (at pp. 14-15), one possibility is that Petitioners' claim centers on the Ohio Supreme Court's use of prohibition as a means of "barring them from access to Ohio's courts," *see* Pet. at i (Question Presented), but if that

is the case, then surely no federal certworthy issue is truly presented. First, whether prohibition was an appropriate remedy here is purely a question of state law, as the Ohio Supreme Court is granted, by the Ohio Constitution, the power to issue such writs to control exercises of jurisdiction by lower courts, such as the trial court here, over which it unquestionably has authority. *See* Ohio Const. Art. IV, Sec. 2(B)(1)(d). No one doubts that the Ohio Supreme Court is the last word in *reviewing* state-law decisions made by Ohio's lower courts. So the question of whether it sometimes *prevents* those decisions, by way of prohibition, when jurisdiction is lacking—rather than waiting to reverse the resulting order on appeal for that same lack of jurisdiction—is purely a state concern.

Second, not only is prohibition a purely state concern as a general matter, but if the issue is viewed in terms of the particular jurisdictional decision that was at the heart of the prohibition decision—whether the *DeRolph* case had been closed by *DeRolph IV* or not—then that, too, is a state-law issue. The question in *Lewis* was what the Ohio Supreme Court meant to do in *DeRolph IV*, and surely this Court could not, as a matter of *federal* law, somehow tell the Ohio Supreme Court that it *misread* its own earlier opinion, and that *DeRolph IV* really meant something other than what *Lewis* said it meant. Thus, if Petitioners' case centers on the fact that prohibition was issued here, it fails to invoke federal law and this Court's federal jurisdiction.

Alternatively, even the Ohio Supreme Court's decision to grant prohibition somehow raises legitimate federal issues, so that this Court has the *power* to review that decision, the issue is still not one that the Court *should* review. The question presented is not one on which the lower courts are split, of course, nor does it conflict with any

precedent of this Court. It does not address a widespread problem, for, even in Petitioners' view, the *Lewis* decision was a "singular aberration." Pet. at 14.

Moreover, if we accept Petitioners' insistence that they seek review only of the *Lewis* prohibition decision, and do not seek to smuggle in review of *DeRolph IV*, then this Court's review would not even offer them meaningful relief, and that reason confirms why review is not warranted. If the Court were somehow to order the *Lewis* decision to be reversed, that would apparently mean only that the writ of prohibition would be lifted, and that the trial court would be free to consider Petitioners' request for compliance oversight, injunctive relief, and the like. Any such requests might be rejected by the trial court, or might be eventually rejected by the Ohio Supreme Court on appeal. Thus, even if a federal jurisdictional hook exists, and even if the Court can overlook that such federal issues were not pressed or passed upon, the Court should not review cases where Petitioners will achieve no meaningful relief. Taking these factors together, the Court surely should not grant a jurisdictionally dubious petition where review would lead to no concrete effect.

To all this, Petitioners might respond that their question presented is not aimed solely at lifting the writ of prohibition, as perhaps they believe that federal law requires the Ohio Supreme Court to keep *DeRolph* open. Further, they might say, the Ohio courts are required by the federal constitution to grant *some* additional remedy, or execution of judgment, in further *DeRolph* proceedings. But either version of this "hollow victory" objection, *i.e.*, that *federal law* demands a further remedy or enforcement in the *DeRolph* case, suffers from the same ultimate flaws as the prohibition-only theory—lack of federal jurisdiction and lack of certworthiness—but for different reasons.

First, if the gravamen of Petitioners' appeal is not that the Ohio Supreme Court used a writ of prohibition as the means to confirm *DeRolph's* finish, but that the Ohio Supreme Court *is not allowed to end the case* with an "unremedied" declaration of victory for Plaintiffs, then that is truly an appeal from *DeRolph IV*, not from *Lewis*. As detailed in subsection three below (at pp. 24-27), that means that Petitioners long ago missed their deadline for seeking review here.

Second, even if the deadline problem is set aside, Petitioners cannot establish that any recognized federal right prevents the Ohio courts from declaring them the winners, but proceeding to (a) close the case, thus requiring them to seek further enforcement under a new case name, or (b) keep the case open while declining to give them the affirmative relief that they seek. Either result, however undesirable to Petitioners, surely does not violate *procedural* due process, as they had a chance to persuade the Court in *Lewis* and in *DeRolph IV* to keep the case going, and they had over a decade's worth of process in trying to convince the Ohio Supreme Court to give them a stronger remedy. Indeed, although they did not get all that they wanted, Petitioners were repeated *winners* in the state court litigation. They persuaded Ohio's highest court to declare that the State's school funding system violated the state constitution, and the court directed the Ohio General Assembly to fix the system. In response, the State spent billions more dollars, building new schools and sending more aid to the neediest school districts. That is not a lack of "process."

Nor does Petitioners' objection to a "hollow victory," whether in the form of *DeRolph's* closure, or in the form of receiving "inadequate" enforcement, implicate any federal right to substantive due process or equal protection. Just as Petitioners received due process in their years of litigating, so, too, were they treated as well as any other litigants in

being allowed to make the case against prohibition in *Lewis*, and to make the case for further relief in *DeRolph I, II, III*, and *IV*. The crux of Petitioners' substantive due process claim is they have a substantive right to seek further remedial relief, Pet. at 17-20, while their equal protection claim is grounded in the notion that they are "selectively excluded" from seeking further relief in Ohio's courts. Pet. at 25. But Petitioners do not dispute that they are free to file any new lawsuit they want, challenging the validity of today's school funding system and asking for whatever relief they desire. Pet. at 10 n.7. To be sure, the Ohio courts might say no, but Petitioners are free to try.

Thus, if Petitioners' claims are not merely about the grant of prohibition, but if they more generally involve their purported federal right to "access to Ohio's courts" to try again, they do not raise a federal claim, or not one worthy of this Court's review. Again, as with the limited prohibition theory, it is hard to see what a victory in this Court would gain them, other than a procedural right to litigate under the *DeRolph* caption rather than under a new case caption. That does not warrant this Court's review.

At the end of the day, only one theory of review would ultimately grant Petitioners some relief, as opposed to academic paper shuffling, but that is the one theory that is most plainly outside the Court's purview—the merits of the school funding debate. To be sure, Petitioners strongly disclaim any attempt to have this Court address the merits of Ohio's school funding debate. Pet. at 9. And of course they must do so, as that issue is undeniably a matter of state law only. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). But only by reaching the merits of that issue, or by achieving relief related to those merits, can Petitioners show any concrete effect of this appeal. If all they achieve is a procedural merry-go-round in Ohio's courts, ending in the same spot, then this Petition means nothing.

But if they hope to achieve an order from *this* Court that nudges things toward some concrete "compliance" orders, as they may envision them, then they are asking this Court to wade deep into the superintendence of Ohio law, and into the superintendence of Ohio schools. The Court should decline that perilous invitation.

3. Petitioners appealed the wrong decision, as they truly seek review of *DeRolph IV*, but they missed the deadline.

As explained above, Petitioners' claims are vague and inconsistent, as they insist that they challenge only the *Lewis* prohibition decision, yet they more broadly assail the alleged unfairness of winning *DeRolph IV* as a declaratory matter, while being left with no avenue within *DeRolph* itself to "enforce" that victory. Thus, to some extent, they waver between attacking *Lewis* alone and attacking the result of *DeRolph IV*. In the above section, Respondent State of Ohio seeks to cover all the bases, showing how this case does not warrant review under any interpretation of Petitioners' claims. But in the final analysis, despite the Petition's mixed signals, it seems that Petitioners' fundamental dispute is with *DeRolph IV*, which closed the door on the *DeRolph* case. The issues that they ask the Court to review did not originate in *Lewis*, which "did not modify the scope of *DeRolph IV* but merely confirmed it." Pet. at 12 n.8.

But if the Petition in fact seeks to review *DeRolph IV*, then it should be denied for the simple reason that Petitioners missed the 90-day deadline for seeking review of *that* decision. *See* 28 U.S.C. 2101(c). The mandate in *DeRolph IV* was entered on December 11, 2002, so any petition to this Court was due on March 11, 2003. But this petition was filed about five months after the March deadline passed, on

August 13, 2003, within the timeframe to seek review of *Lewis*. Because the petition, in substance, seeks review of *DeRolph IV*, it is too late.

To be sure, Petitioners purport to challenge only *Lewis*, Pet. at 9-10, but the substance of the Petition points to a quarrel with *DeRolph IV*. The question presented asks whether Petitioners have been deprived of their federal rights by virtue of a "decision of the Supreme Court of Ohio barring them from access to Ohio's courts for the enforcement of" their declarative victories in *DeRolph*. Pet. at i. While *Lewis* is purportedly the offending "decision . . . barring them from" achieving further relief, *DeRolph IV* had already done the same thing, making *it* the challenged "decision . . . barring" further *DeRolph* litigation. As noted above, most Justices of the Ohio Supreme Court expressed the view, in *DeRolph IV*, that the door was closed on *DeRolph*, and in *Lewis*, the court merely confirmed what *DeRolph IV* had already said. *See DeRolph IV*, Pet. App. at 29a ("I do believe that it is proper for the *majority to dismiss the case* once it has reached a finding of unconstitutionality") (Stratton, J., concurring in part and dissenting in part) (emphasis added); *compare* Pet. at 12 ("Nothing in . . . *DeRolph*, in particular, foreshadowed *Lewis*' sudden and anomalous divestment of the rights already declared and the relief already ordered in *DeRolph IV*").

The fact that Petitioners' dispute is with *DeRolph IV*, not *Lewis*, is best shown by asking what remedy might satisfy them. Surely Petitioners will not consider their federal rights vindicated if *Lewis* is vacated, allowing the trial court to consider Petitioners' request for a "compliance conference," only to lead to an appeal to the Ohio Supreme Court and a future *DeRolph V* decision that simply states that the case is over and that no further remedies will be allowed. Petitioners' case centers on the idea that their federal rights were violated when the Ohio Supreme Court took away their

right to seek further relief in *DeRolph*, so they would be no happier if that result is reached on further appeal rather than by prohibition. And if they would be unsatisfied with any relief from this Court that would still allow for a closure in *DeRolph V* that echoes *Lewis* and *DeRolph IV*, then that confirms that their dispute is indeed with *DeRolph IV*, so they should have appealed *that* case.

Not only is this a matter of missing the right deadline and of appealing the right case, but the fact that the *Lewis* decision was *compelled* by *DeRolph IV* also means that *Lewis* is supported by an independent and adequate state law ground, preventing review of *Lewis*. That is because the court's duty to follow its prior decision is a matter of state law, regardless of any alleged federal issues that independently arose in that stage of the litigation. *See Western Electrical Supply Co. v. Abbeville Elec. Light & Power Co.*, 197 U.S. 299, 303 (1905) (party could not appeal second of two related state supreme court cases, even if federal issue was raised, where the first state court case dictated the outcome of the second; second decision independently resulted from state-law issue of law of the case, regardless of other grounds); *Bonner v. Gorman*, 213 U.S. 86, 92 (1909) (second state court decision could not be appealed on federal issue where second decision merely affirmed the trial court's execution of the mandate from first decision; "[c]ompliance with the mandate was the only question open to and determined by the higher court" on the second appeal, so the federal question "came too late.")

Here, too, the *Lewis* result was mandated by *DeRolph IV*, so not only were Petitioners required to appeal *DeRolph IV* on time, but also, the *Lewis* decision was based on the court's state-law duty to follow its own prior decision.

B. The petition should be denied because the purported question presented is not actually raised by this case.

The petition should be denied for the further reason that the question presented, as stated by Petitioners, is not actually raised by this case. That question posits that the decision below "bar[s] them access to Ohio's courts for the enforcement of a final judgment" that "entitl[es] petitioners to affirmative relief." But *Lewis*, the decision appealed from, does nothing to broadly "bar them access" to the courts. Rather, *Lewis* grants the writ of prohibition "and end[s] any further DeRolph litigation in *DeRolph v. State*." Pet. App. 13a. Thus, *Lewis* merely prevents further proceedings *in the case styled DeRolph v. State itself*, which had already been terminated by *DeRolph IV*, as *Lewis* explains, leaving Petitioners free to "access the courts" to file a new lawsuit regarding school funding, and to seek (though not necessarily obtain) whatever relief they desire.

Thus, *Lewis* does nothing other than apply Ohio-law doctrine about when a particular case is deemed final and complete, and the comments of the Justices show that nothing about terminating *DeRolph v. State* itself barred collateral litigation to enforce rights declared in *DeRolph*. Indeed, in *DeRolph IV*, several justices regarded such collateral litigation as inevitable. Pet. App. at 24a-25a (Resnick, J., concurring); Pet. App. 29a (Stratton, J., concurring and dissenting in part); Pet. App. 31a (Moyer, C.J., dissenting). Again, nothing prevents Petitioners from filing a suit to "enforce" their rights.

Consequently, the question presented, which suggests that Petitioners are barred from all court access on school funding issues, does not actually reflect the nature of the decision below. Thus, review should be denied.

C. The Court should not violate federalist principles by entangling itself in state school-funding litigation, nor should it open the door to federalizing virtually all state law issues.

Finally, the Court should not grant review here because the Petition is nothing less than an attempt to fully immerse the Court in the school-funding litigation that has long occupied state courts around the nation—even though that litigation is based on state law, and even though the Court has already declared that there is no federal constitutional right to a public education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). This case asks the Court to revisit *Rodriguez* through the back door, and the Court should decline to do so.

To be sure, Petitioners dutifully note that they do not challenge *Rodriguez*, which found that education is not a fundamental right under the U.S. Constitution, Pet. at 9 n.6. However, they undercut that disclaimer when they ask the Court to "reconsider the fundamentality of education in a context in which children are routinely deprived of such rights and in light of the heightened contemporary importance of those rights." *Id.* at 26 n.22. The Court should decline that misguided invitation.

In our federalist system, public education has long been the province of state and local government, and *Rodriguez* has ensured that States may work out their own approaches to education, especially when it involves litigation rooted in state constitutional provisions. Of course, the federal courts have been involved in public education where undoubted federal rights were involved, such as in the nation's long road to desegregation and its fight against racial discrimination. *See Brown v. Board of Education*, 347 U.S. 483 (1954). But in the absence of such a clear federal

constitutional mandate, the Court ought not stretch due process principles to create federal oversight over whether a State's educational system is "thorough and efficient."

Moreover, review here would not only enmesh the Court in school-funding litigation, but it would open the door to federalizing almost any state-law issue—in stark contrast to this Court's precedents—by the indirect route of policing state-court oversight of state officials. The Court long ago rejected the notion that all state-law errors became federal issues through the due process clause, explaining that:

> The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law.

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 166 (1917). And in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court held that federal courts had no jurisdiction to order state officials to follow state law, opining that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." 465 U.S. at 106. Petitioners' theory simply involves a state court as an intermediary to get around *Pennhurst:* a federal court could not order a governor to follow state law, but in some cases it could *order the state court to in turn order the governor* to follow state law or act in a certain way.

Just as the Court ought not involve itself in questions of school funding under state law, it ought not open the door to a broad theory that would convert virtually any state law issue into a federal case.

CONCLUSION

For the above reasons, the petition should be denied.

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In the Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITIONERS' REPLY BRIEF

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I. The State's Brief In Opposition Provides Compelling Evidence Of The Need For, And Appropriateness Of, Review By This Court.

If the petition for certiorari left any doubt as to the need for and appropriateness of the review sought by Petitioners, the State's Brief in Opposition must certainly remove it. In its brief, the State brazenly claims for itself the unilateral right to determine when and with respect to whom a final judgment issued by the highest court of Ohio is binding, thereby signaling contempt not only for these Petitioners but for the rule of law *in toto*. Absent the intervention of this Court, the State clearly intends to continue depriving Ohio's school children of their declared rights, in contravention of the Due Process Clause of the United States Constitution.

A. The State denies any obligation to obey the directives of the highest court of Ohio concerning rights established by the supreme law of Ohio.

One may scour the State's brief in vain for any indication that the State intends to comply with *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E. 2d 529 (2002) ("*DeRolph IV*") or perceives any obligation to do so now that the case is, in the State's view, "closed."[1] In essence, the State claims to stand above the law. Such a view, espoused by Ohio's Attorney

[1] While the State claims to have improved its funding system *prior to DeRolph IV*, in response to earlier *DeRolph* decisions, it makes no pretense of having complied with *DeRolph IV*, which determined that the school funding system remained unconstitutional and that "the General Assembly has not focused on the core constitutional directive of *DeRolph I*: 'a complete systematic overhaul' of the school-funding system." *DeRolph IV* at 435. Moreover, the State has now retreated from reforms it earlier implemented, making the predicament of many of Ohio's schools more desperate today than at the time *DeRolph IV* was rendered. *See* Brief of Amici Curiae Various Members of the Ohio General Assembly Minority Caucuses in Support of Petitioners.

General on behalf of the State of Ohio, must be regarded as dangerous, and it must be forcefully rejected by the Court.

There is no longer room for debate regarding the unconstitutionality of Ohio's school funding system, nor does the State claim any. Likewise, there can be no debate regarding the obligation of the State to comply with orders of the Ohio Supreme Court concerning the educational mandates of the Ohio Constitution.[2] The State's repudiation of this obligation, and the consequent negation of the declared rights of Ohio's children, cannot be squared with the rule of law.

In previous generations, there were officials who, to the lingering shame of their respective states, refused to enforce the desegregation decrees of the federal courts.[3] The present conduct of Ohio's officials is a throwback to those times and must not be indulged. The intervention of this Court is

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[2] The relief ordered by *DeRolph* has always been both declaratory and injunctive. The State's claim that the Ohio Supreme Court "limited itself to declaratory relief," State's Brief at 4, plainly contradicts the facts *and* the State's own acknowledgment of the court's remedial orders. State's Brief at 3 ("*DeRolph* plaintiffs received...a remedial directive"), 14 ("remedial orders that the Oho Supreme Court has already issued"), and 22 ("the court directed the Ohio General Assembly to fix the system."). *See also* Petition at 3-5.

[3] Others understood that the rule of law must prevail, regardless of personal preferences or political pressures. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 94 n.6 (1995) ("Immediately after the Court's decision in *Brown v. Board of Education*, the State's Attorney General issued an opinion declaring the provisions that mandated segregation unenforceable.") (citations omitted). *But see Glassroth v. Moore*, 335 F.3d 1282, 1303 (11th Cir. 2003) ("The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. ...If necessary, the court order will be enforced. The rule of law will prevail."), and *Glassroth v. Moore* ____ F. Supp.2d ____, 2003 U.S. Dist. LEXIS 13907, 6-7 (M.D. Ala. Aug. 5, 2003).

essential to protect the federal due process rights of Ohio's school children and to restore the rule of law to Ohio.

B. The state's disingenuous theory that "closure" of a case nullifies the final judgment eviscerates the rule of law.

The State grounds its refusal to obey the directives of the Ohio Supreme Court on a characterization of the *DeRolph* litigation as "closed." The State's logic is bizarre. The idea that a final judgment has no value unless a court retains jurisdiction is inimical to the rule of law (and unsupported by even a single citation to authority). It is also flatly contradicted by the mandate sent to the trial court in this case, which commanded that court to "proceed without delay to carry the [judgment] in this cause into execution."[4]

Had there been no appeal of the trial court's initial *DeRolph* decision, the trial court indisputably would have had jurisdiction to enforce its orders. Yet the State now argues that because the trial court's decision was appealed and essentially *upheld*, the final judgment is unenforceable.

If permitted to stand, the State's "closure" theory would drastically alter long standing principles of appellate jurisprudence. *Every* appellate court would be required to retain jurisdiction over *every* case, *in perpetuity*, lest its judgments otherwise have no effect. Lawyers throughout Ohio would advise defendants that they need not comply with

[4] *DeRolph IV*'s mandate concerned an *immediately-effective final judgment*, and the mandate was therefore sufficient to enable the trial court to enforce the judgment. No *remand* was required. *Compare DeRolph v. State*, 78 Ohio St.3d 419, 421, 678 N.E.2d 886 (1997) (explaining the remand to the trial court for hearing during the stay of *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) ("*DeRolph I*") as follows: "Our decision to remand this matter is a recognition of the unique role of trial courts as triers of fact and gatherers of evidence.").

adverse judgments of Ohio's high court once that court "closes" the case, and lawyers representing prevailing plaintiffs would advise them in these circumstances to appeal *favorable* judgments to *this* Court in order for the judgments to be meaningful.

The State's theory bears no resemblance to any conceptualization of ordered liberty, and it must be doubted whether even the State takes it seriously. If the State sincerely believed, and intended to universally implement, its revolutionary proposition that judgments lose effect once appellate courts relinquish jurisdiction, the extent of upheaval throughout the state and nation can scarcely be imagined.[5] In truth, however, there is no evidence the State has generalized or intends to generalize its "closure" theory beyond the attempted application here. The State's conceit is shameful and supports Petitioners' claim that the State, empowered by *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (2003) ("*Lewis*"), has uniquely deprived them, and them alone, of their federally-protected rights to due process and equal protection of the laws.

Although the concept of "closure" plainly cannot have the meaning the State attributes to it, the finality of *DeRolph IV* is relevant. The court did indeed close the *merits* of the case, and Petitioners were, for the first time, recipients of a final judgment in their favor with remedial decrees that were neither stayed nor subject to reconsideration. *Petitioners* had no reason to desire further review of *DeRolph IV* – and *the*

[5] For example, the State's "closure" theory would mean that *no* declaration of unconstitutionality heretofore issued by the Ohio Supreme Court is presently effective since, as noted in *DeRolph IV*, "[i]n no case other than *DeRolph* have we [the Ohio Supreme Court] retained jurisdiction once we have made a finding of unconstitutionality." *Id.* at 441 (Lundberg Stratton, J., concurring in part and dissenting in part).

State was barred by *res judicata* from relitigating it.[6] Unable to challenge *DeRolph IV* directly, the State sought a means to evade it. *Lewis* accomplished this not by altering *DeRolph IV*, but by prohibiting its enforcement. This *Lewis* may not do consistent with the Due Process Clause.

II. Petitioners' Claims Are Properly Before The Court And The Petition Should Be Granted.

A. Petitioners' claims were pressed below.

In the Answer they filed as Intervenors in *Lewis*, Petitioners asserted that issuance of the writ of prohibition would, by divesting the trial court of remedial authority for the wrongs declared in *DeRolph IV*, violate rights protected by the United States Constitution, specifically referencing substantive due process. The State concludes, without supporting authority, that "[s]urely that slight reference is not enough."

But the Answer was Petitioners' *only* filing in *Lewis*, save their Motion to Intervene. Had the Ohio Supreme Court permitted further briefing, hearing, or argumentation before summarily issuing the writ of prohibition, Petitioners could have more fully presented their federal claims to that court. In the context of an Answer, however, the reference was appropriate and sufficient to preserve Petitioners' claims for review by this Court.

In arguing otherwise, the State disregards the oft-repeated principle that "no particular form of words is necessary to be used in order that the Federal question may be said to be

[6] *DeRolph IV* constituted a final judgment issued in response to the State's earlier motion for reconsideration of *DeRolph v. State*, 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) ("*DeRolph III*"). There is no mechanism in Ohio by which the State could have requested further reconsideration. The State has had as many bites of the apple as state law allows, and *DeRolph IV* was truly a *final* final judgment.

involved," so long as there is "something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party[.]" *Dewey v. Des Moines*, 173 U.S. 193, 199 (1899). Petitioners' Answer in *Lewis* did just that, and the claims Petitioners now assert are sufficiently encompassed by "substantive due process" as to be cognizable here. The Due Process Clause does not distinguish procedural and substantive components, and the concepts are not always distinct. The process that is due in the context of this case is access to Ohio's courts for enforcement of the final judgment awarded in *DeRolph IV*. Without that process, Petitioners' declared rights are left to the whim of the violator, the State of Ohio, and the Ohio Constitution is stripped of legal significance. The *process* deprivation (access to the courts) is thus an element of the *substantive* right to enforce the remedy *DeRolph IV* awarded (as opposed to being a precondition to the deprivation of a right). Likewise, because due process mandates fairness in the application of the law, equal protection is an element of due process, in addition to being independently protected in the Constitution. *See* Petition at 24, n.20; *Stanley v. Illinois*, 405 U.S. 645 (1972) (interweaving due process and equal protection analysis where only the latter was raised below).

B. *Lewis* – <u>not</u> *DeRolph IV* – is at issue.

The State's argument that Petitioners should have sought review of *DeRolph IV* rather than of *Lewis* is difficult to fathom. To the extent it is simply an application of the State's "closure" theory, it is equally absurd. Prevailing litigants do not appeal to this Court out of fear that final judgments awarded them by the high courts of the states are otherwise unenforceable.

To the extent the State means to suggest that Petitioners seek something more here than they were awarded in *DeRolph IV*, the argument is simply wrong. *DeRolph IV* declared with finality the unconstitutionality of Ohio's school funding system, and it reiterated the specific reforms the State must undertake. *DeRolph IV* was a comprehensive victory for Petitioners, and it contained no stay. But for *Lewis*, Petitioners would now be invoking the authority of Ohio's courts to enforce precisely what *DeRolph IV* awarded.

C. Petitioners' interests are momentous and merit due process protection.

The State attempts to deny federal due process protections by trivializing the interests Petitioners assert. But, as the Petition demonstrates, Petitioners' interest (in enforcing, through the courts of Ohio, remedies previously awarded for violations of educational rights already declared) is of such paramount importance as to require due process protection.[7] Moreover, this Court has already determined that state-created rights to education qualify for such protection. *Goss v. Lopez*, 419 U.S. 565 (1975).

Lewis' violations of Petitioners' due process rights cannot be justified by the contrivance of characterizing *Lewis* as mere superintendence of Ohio's lower courts. In the usual

[7] *See DeRolph IV* at 436-37 ("[T]he constitutional mandate must be met....The Free Speech Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, the Thorough and Efficient Clause of the Ohio Constitution, and all other provisions of the Ohio and United States Constitutions protect and guard us at all times."); *DeRolph v. State*, 89 Ohio St.3d 1, 11, 728 N.E. 2d 993 (2000) ("*DeRolph II*") ("the stakes in this endeavor cannot be overestimated--we are dealing with the futures of the children of this state and in reality the very future of our state"). *Accord, Grutter v Bollinger*, 539 U.S. ____, 123 S.Ct. 2325, 2340 (2003); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

circumstances, a writ of prohibition may be of "purely state concern," as the State argues. But when that writ violates the Due Process Clause, state interests are transcended, and neither the State nor the Ohio Supreme Court may arrogate to itself the final word on the subject.[8]

Finally, the State's claim that it is free to deprive Petitioners of the interests secured in *DeRolph* because Petitioners can always bring a new suit is nonsensical. If rights vested through litigation can be denied arbitrarily by the State, what purpose could be served in starting over again? Litigation is not a game. The rule of law demands that the outcome of litigation be honored and implemented by the parties, with the aid of the courts if necessary. The State's insistence that Petitioners have received all the process due them because they were permitted to litigate, and repeatedly prevailed, in Ohio's courts for a decade – notwithstanding *Lewis*' deprivation of the *results* of that litigation – makes a mockery of due process. State's Brief at 2. The constitution does not protect process as an end in itself. Process stripped of consequence is meaningless and constitutionally insufficient.

The State condemns the prospect of "merry-go-round" litigation, but it is the State's own refusal to conform to the law that is the cause. The course the State proposes – that Petitioners begin anew to seek what in law they have already achieved – condemns Petitioners to a Sisyphusian fate in

[8] *See McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 233 (1934) ("The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution."). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982).

which they endlessly seek and win what the State forever denies them. The movie GROUNDHOG DAY comes to mind.[9]

D. Protection of Petitioners' rights need not entangle the Court in local matters.

The State warns that all manner of adverse consequences will flow if the Court grants this Petition: the Court will be drawn into reconsideration of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); state law issues will all be federalized; the Court will find itself superintending Ohio's schools. None of these fears is justified.

The due process rights asserted by Petitioners – to state-created judicial processes for enforcement of previously-issued remedial decrees – do not depend upon reconsideration of *Rodriguez*. Similarly, because the interests Petitioners assert are of paramount importance and the deprivations are egregious (working a *complete* divestment of rights declared in *DeRolph IV*), granting the Petition would have far narrower implications than the State predicts. This Court has never hesitated to distinguish between deprivations of state-created rights that rise to the level of a federal claim and those that do not, and acceptance of this case would not require a departure from established guideposts. In response to the contention that "even reviewing this case would draw the Court far deeper into state sovereign territory than it has ever trod," (State's Brief at 4), Petitioners paraphrase *Logan*: "Certainly, it would require a remarkable reading of a 'broad and majestic [term],' to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment," while state-created rights to education, and to judicial enforcement of declared rights, are not. *See Logan* at 431 (citation omitted).

[9] Columbia/Tristar Studios 1993.

The State's claim that this Court will be drawn into superintending Ohio's schools if it grants the Petition is particularly troubling. *See* State's Brief at 29. Petitioners do not ask this or any other Court to superintend Ohio's schools or to dictate the precise parameters of the remedy the State must implement.[10] Assuming the State complies, as it must, with a decision rendered by this Court, there is no reason why federal oversight of Ohio's schools should follow. The State's argument to the contrary appears to carry an implicit threat that the State intends to continue violating the rights of its school children *even in defiance of this Court*. Such intimation only further evinces a disregard for the rule of law, and it cannot be permitted to deter this Court's review. Officials who delayed, obstructed, and dissembled in the wake of the school desegregation cases of the last century ultimately were compelled to conform to constitutional requirements. This Court was not cowed by the recalcitrance of state officials then, and it must not be bullied by the arrogance of Ohio's now.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, Petitioners respectfully request that the Petition be granted.

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[10] Petitioners have always understood that the contours of the ultimate remedy for the unconstitutionalities declared in *DeRolph* must be determined by the State (in conformance with the specific dictates of *DeRolph*). Petitioners have, at various points in the litigation, requested certain items of *interim* relief. For the most part, the Ohio Supreme Court did not order such relief, and when it did (*see DeRolph II* at 351 (ordering "immediate" funding of unfunded mandates)), the State did not comply. But the court's determination not to order certain elements of relief on an interim basis does not in any way diminish the *present* obligation of the State to comply with the final judgment in *DeRolph IV*.

Respectfully submitted,

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(2)

No. 03-245

In the Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF AMICI CURIAE Ohio School Boards Association, Buckeye Association of School Administrators and Ohio Association of School Business Officials in Support of Petitioners

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INTEREST OF AMICI CURIAE

The Ohio School Boards Association (OSBA) is a private, non-profit corporation representing all 721 of Ohio's school districts and related educational entities. OSBA's purpose is to encourage and advocate for public education through local citizen responsibility. The Buckeye Association of School Administrators is a non-profit corporation comprised of approximately 1700 school district superintendents and administrators from Ohio's school districts. Its goal is to develop exemplary school leaders and advocate for public education. The Ohio Association of School Business Officials (OASBO) is a non-profit educational management organization representing more than 950 Ohio school district treasurers and business managers. OASBO is dedicated to sharing the best methods of school business administration and improving the prudent fiscal management of Ohio's public schools. The school associations enter this appearance on behalf of the petitioners, public school students, teachers, parents, and individual school administrators, boards, and board members.[1]

STATEMENT OF THE CASE

This case presents the issue of the Ohio Supreme Court's violation of the Due Process Clause of the Fourteenth Amendment by denying an adequate remedy to successful

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. In accordance with this Court's Rule 37.6, amici curiae represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amici curiae, its members, or its counsel made monetary contributions to the preparation or submission of this brief.

plaintiffs in a school funding case. In five decisions in the case of *DeRolph v. Ohio* from 1997 to the present, the Ohio Supreme Court has declared that Ohio's school funding system is unconstitutional and ordered the state legislature to fix the funding system pursuant to an affirmative, structural injunction.[2] To date, however, the state has continually refused to comply with the Ohio court's injunction by making the required changes in the school funding system. Notwithstanding this open defiance, the Ohio Supreme Court in its decision of May 16, 2003, abruptly issued a writ of prohibition terminating the trial court's jurisdiction to enforce the Court's injunction thereby denying the successful plaintiffs a meaningful remedy in the case. *State ex rel. State of Ohio v. Lewis,* 789 N.E.2d 195 (Ohio 2003) (*DeRolph V*) (App. 1a-16a).

In 1997, the Ohio Supreme Court held that the state's system for funding public schools which relied primarily on local property taxes violated the Ohio Constitution. *DeRolph v. Ohio,* 677 N.E.2d 733, 747 (1997) (*DeRolph I*). To address the systemic violation, the Ohio court awarded

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[2] *DeRolph v. State,* 677 N.E.2d 733 (Ohio 1997) (*DeRolph I*) (finding school funding system unconstitutional and ordering declaratory and injunctive relief); *DeRolph v. State*, 678 N.E.2d 886 (Ohio 1997) (clarifying remedy on state's motion for reconsideration); *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000) (*DeRolph II*) (reaffirming relief to restructure public school funding); *DeRolph v. State,* 754 N.E.2d 1184 (Ohio 2001) (*DeRolph III*) (ordering implementation of specific changes); *DeRolph v. State*, 758 N.E.2d 1113 (Ohio 2001) (ordering mediation); *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002) (*DeRolph IV*) (reaffirming required structural relief after failed mediation); *State ex rel. State of Ohio v. Lewis,* 789 N.E.2d 195 (Ohio 2003) (*DeRolph V*) (prohibiting enforcement of relief).

declaratory and injunctive relief. *Id.* It issued an affirmative, structural injunction requiring the state to "fix the system" and undergo a "complete systematic overhaul" to "create an entirely new school financing system" consistent with the constitutional requirement of a thorough and efficient public education system. *Id.* In a subsequent 2000 decision, the Court clarified what it meant by providing a "thorough and efficient" education system and repeated its injunctive command that the state legislature undertake a "complete systematic overhaul" of the school funding system. *DeRolph v. Ohio,* 728 N.E.2d 993 (Ohio 2000) (*DeRolph II*).

When the State failed to respond to the judicial orders, the Ohio Supreme Court in a third decision ordered the legislature to implement specific steps to comply with the prior commands based on the state's own evidence of available monies. *DeRolph v. Ohio,* 754 N.E.2d 1184, 1201 (Ohio 2001); *see DeRolph v. Ohio,* 758 N.E.2d 1113, 1120-21 (Ohio 2001) (Douglas, J., concurring). "The state is hereby ordered to implement the changes described above. . . . If the order receives less than full compliance, interested parties have remedies available to them." *DeRolph III,* 754 N.E.2d at 1201. When the State sought reconsideration of that decision two months later based on the lack of funds, the Ohio Supreme Court referred the case to mediation. *DeRolph,* 758 N.E.2d at 1114. *See* Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation,* 18 OHIO ST. J. ON DISP. RESOL. 391 (2003) (describing the mediation process in *DeRolph* and the potential benefits that might have been gained).

When mediation failed, the Ohio Supreme Court repeated its general structural order to fix school funding:

> The General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient.

DeRolph v. Ohio, 780 N.E.2d 529 (Ohio 2002) (*DeRolph IV*) (App. 19a).

At every step in the remedial process, the Ohio courts have been deferential to the institutional and practical concerns of the legislative branch. *DeRolph IV* (App. 19a). *See Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977) (holding that courts must defer to institutional defendants in crafting equitable relief). The Ohio courts abstained from designing their own corrective system and deferred to the expertise of the defendants in legislation and education. *DeRolph I*, 677 N.E.2d at 746-48; *DeRolph II*, 728 N.E.2d at 1019-20. The Supreme Court stayed the mandate to insulate the legislature and State from contempt penalties while giving them the necessary time to work through the complexities of correcting the system. *DeRolph I*, 677 N.E.2d at 747; *DeRolph II*, 728 N.E.2d at 1021 (granting defendants more time to comply with constitution). Even after the mediation failure and five years of defiance from the defendant, the Supreme Court continued to grant the Ohio defendants deference by merely repeating the mandate of structural relief rather than imposing more prophylactic or intrusive measures. *DeRolph IV* (App. 19a).

However, the Ohio Supreme Court's deference to the legitimate institutional concerns of the wrongdoer has evolved into complete denial of the plaintiffs' right to relief for a

proven violation of the law. *See* Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623 (2003) (arguing that the courts' deference to institutional defendants results in failure to vindicate plaintiffs' constitutional rights). After twelve years of litigation, and six years of ordered and expected systemic relief, the Ohio Supreme Court abruptly prohibited the trial court from enforcing the injunctive decrees. *DeRolph V* (App. 1a-15a). The Ohio court's flagrant denial of meaningful relief violates the Fourteenth Amendment's constitutional guarantee of due process of law and necessitates this Court's review.

REASONS FOR GRANTING THE PETITION

I. THE OHIO SUPREME COURT'S DENIAL OF A MEANINGFUL REMEDY VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THUS PRESENTS A FEDERAL QUESTION NECESSITATING THIS COURT'S REVIEW.

Ubi jus, ibi remedium. Where there's a right, there must be a remedy. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768). The Ohio Supreme Court dishonored this ancient legal maxim by arbitrarily prohibiting all remedies for unconstitutional state action previously ordered by that same court in the case. This arbitrary refusal to provide a remedy to enforce important state constitutional rights triggers the federal Due Process Clause and necessitates this Court's review.

The Ohio Supreme Court's denial of a meaningful remedy contradicts this Court's command that the Due Process Cause of the Fourteenth Amendment requires an adequate remedy

for legal rights. *See State Farm v. Campbell,* 123 S. Ct. 1513, 1519 (2003) (the right to reasonable and non-arbitrary remedy implicates both substantive and procedural due process). This Court has recognized that the Due Process Clause requires an adequate remedy for an established violation of law. *See Reich v. Collins,* 513 U.S. 106 (1994); *Harper v. Virginia Dep't of Tax.,* 509 U.S. 86 (1993); *McKesson Corp v. Division of Alcoholic Beverages,* 496 U.S. 18 (1990). In the tax cases of *Reich, Harper,* and *McKesson,* this Court held that the Due Process Clause requires state courts to provide a successful plaintiff with a minimally-adequate remedy that provides "meaningful" relief. *Reich,* 513 U.S. at 108, 114; *Harper,* 509 U.S. at 100-102; *McKesson,* 496 U.S. at 31, 39. While the state court has flexibility to choose among appropriate equitable and monetary remedies, it cannot, consistent with federal due process, select a remedy that fails to provide meaningful relief to the plaintiff.[3] *Harper,* 509 U.S. at 101; *McKesson,* 496 U.S. at 39.

Additionally, in the punitive damages cases, this Court has found arbitrary and unreasonable state court remedies to violate the Due Process Clause. *State Farm,* 123 S. Ct. at 1519-20; *BMW of North America v. Gore,* 517 U.S. 559 (1996); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 18 (1991). These cases evaluating excessive state court remedies are grounded in the core concern of federal due process regarding the unreasonableness of state action. *State Farm,* 123 S. Ct. at 1520; *Gore,* 517 U.S. at 587 (Breyer, J.,

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[3] *Harper,* 509 U.S. at 102 ("Virginia is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined. State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy.").

concurring) ("This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion."); *Haslip,* 499 U.S. at 59 (O'Connor, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process--of the law in general--is to allow citizens to order their behavior."). Where state court remedies are arbitrary and unreasonable, this Court has invalidated that relief under the Due Process Clause. *State Farm,* 123 S. Ct. at 1521; *Gore*, 517 U.S. at 560.

The Ohio Supreme Court's *DeRolph V* decision, which denies effective relief, contradicts this Court's precedent holding that the Due Process Clause requires a modicum of reasonable relief to vindicate violations of legal rights. Indeed, as discussed more fully below, the right to minimally-adequate relief is a hallmark of our historic jurisprudence and is therefore a fundamental right that has and should be protected by the Fourteenth Amendment's Due Process Clause. The case presented for review, therefore, asks this Court simply to rely upon the existing precedent to endorse the historic maxim that legal rights, at a minimum, require some adequate remedial vindication.

A. The Right to a Remedy is a Fundamental Right.

The right to a remedy is a fundamental right historically recognized in our legal system as central to our concept of ordered liberty. *Cf. Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997). "The principle that rights must have remedies is ancient and venerable." Donald H. Zeigler, *Rights, Rights of Action, and Remedies: An Integrated Approach,* 76 WASH. L. REV. 67, 71 (2001); *see* Tracy A.

Thomas, *Congress' Section 5 Power and Remedial Rights,* 34 U.C. DAVIS L. REV. 673, 689-90 (2001) (explaining that the notion of a remedy as a necessary part of any legal substantive right is not a new idea). In 1703, the right to a remedy was expressly recognized in Anglo-American law. In *Ashby v. White*, the Chief Justice of the King's Bench stated the basic right to a remedy:

> If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for . . . want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right.

92 Eng. Rep. 126 (K.D. 1703).

This Court from its earliest time has recognized the bedrock principle that deprivations of law require remedies. In *Marbury v. Madison,* Chief Justice Marshall endorsed the common law requirement mandating a remedy for every wrong:

> It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . For it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.

5 U.S. (1 Cranch) 137, 163-66 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23). As the *Marbury* Court acknowledged, the right to a remedy is a core component of ordered liberty:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Id. at 161, 163; *see also United States v. Loughrey*, 172 U.S. 206 (1898) ("The maximum 'ubi jus, ibi remedium,' lies at the very foundation of all systems of law.").

Additional support for the historical presence of the right to a remedy is found in the state constitutions of three fourths of the states which contain express remedial guarantees. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in Federal Courts*, 38 HASTINGS L. J. 665, 676 n.68 (1987). These guarantees requiring the right to a remedy in open court derive from Lord Coke's interpretation of the Magna Carta. David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199 (1992). First appearing in the late 1700s, the state constitutional rights to a remedy were adopted to ensure the independence of the judiciary against corruption and control by the other political branches. Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655, 656-59 (1999).

In Ohio, the right to a remedy is a fundamental right guaranteed by the state constitution. OH. CONST. ART. 1 § 16. The state constitution provides: "All courts shall be open,

and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." *Id.* (adopted in current form in 1851 based on 1802 predecessor). Ohio has interpreted this provision to require a "meaningful remedy." *Sorrell v. Thevenir,* 633 N.E.2d 504, 513 (Ohio 1994) (interpreting constitutional guarantee as encompassing the fundamental right to a "meaningful remedy" that provides satisfaction for injuries sustained); *Gaines v. Pre-Term Cleveland, Inc.*, 514 N.E.2d 709, 716 (1987) ("Denial of a remedy and denial of a *meaningful* remedy lead to the same result: an injured plaintiff without legal recourse."). Thus, Ohio has accepted the right to a meaningful remedy as a fundamental right that cannot be abridged.

Furthermore, it is appropriate to consider the right to an adequate remedy as a fundamental right that cannot be arbitrarily denied. Remedies perform two critical functions in the law. First, they give meaning to abstract rights. Owen Fiss, *The Forms of Justice,* 93 HARV. L. REV. 1, 52 (1979); Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 885-97 (1999). Rights standing alone are simply expressions of social values. It is the remedy that defines the right by making the value real and tangible by providing specificity and concreteness to otherwise abstract guarantees. Without remedies, rights are mere ideals, promises, or pronouncements that may or may not be followed. Zeigler, *Rights Require Remedies, supra* at 678. As Justice Holmes expressed, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp." *Ex parte United States,* 257 U.S. 419, 433 (1922). Like manners, rights simply become something that one should do, but not something that one is compelled to do.

The enforcement power of the remedy is the quality that converts pronouncements of ideals into operational rights. It is this enforceability that makes something a legal rather than moral or natural right. Zeigler, *Rights Require Remedies, supra* n.72; I. JENKINS, SOCIAL ORDER AND THE LIMITS OF LAW 247-55 (1980). The definition of a claim as a "legal" right depends upon the availability of this enforcement:

> It is essential to the idea of a law that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions of commands which pretend to be laws will, in fact amount to nothing more than advice or recommendation.

THE FEDERALIST NO. 84, AT 110 (A. Hamilton). The remedy is thus the integral part of each right that is ultimately necessary to the effectuation of the rule of law. For without a remedy, judicial decisions are merely advisory opinions, hypothetical undertakings with no practical effect. Thomas, *Remedial Rights*, *supra* at 659-60. Without remedies, the law simply has no force in society. Individuals need not conform their behavior and established rights may simply be ignored.

B. The Ohio Supreme Court's Denial of an Adequate Remedy Rises to a Level of a Federal Due Process Violation.

The federal due process right to an adequate remedy was arbitrarily denied to the school petitioners by the Ohio Supreme Court in this case. Basic notions of fairness and liberty embodied in the Due Process Clause require that some minimally adequate remedy be awarded when plaintiffs have successfully established the violation of a legally protected right. *See* Thomas, *Remedial Rights, supra* at 758-66

(collecting authorities and proposing parameters for the adequacy of a remedy). The arbitrariness of the Ohio court's decision is apparent on the face of the opinion. The *DeRolph V* decision itself reaffirms the existence of a constitutional violation -- yet it simultaneously prohibits any remedy for that violation. *DeRolph V* (App. 10a). At the end of the day, the school plaintiffs were awarded nothing more than an advisory opinion suggesting that the State correct the unconstitutional funding. *Id.*

There is no legitimate basis for the Ohio Supreme Court's action denying all effective relief in the case. The Court disingenuously suggests that the reason for the denial of all relief was because the trial court "patently and unambiguously lacked jurisdiction" to conduct remedial proceedings. *DeRolph V* (App. 11a). However, it is well-established that a trial court has general authority to conduct enforcement proceedings to award further relief in accordance with the declaration of rights. OHIO CONST. ART. IV, § 4; Ohio Civ. R. 70. Moreover, the Ohio Supreme Court itself expressly required the trial court to assume such authority in the *DeRolph* case in three of its prior opinions. *DeRolph I,* 677 N.E.2d at 747; *DeRolph IV,* 780 N.E.2d at 282. Instead, the Supreme Court simply used the writ of prohibition directed at the trial court to terminate its own previously issued injunction. There was, however, no legal basis for terminating relief. Termination of injunctive relief was arbitrary in the absence of any indication that the defendant acted in good faith to substantially comply with the order. *See Agostini v. Felton,* 521 U.S. 203 (1997); *Board of Ed. of Okla. City Pub. Sch. v. Dowell,* 498 U.S. 237, 250 (1991). Nor was modification of the injunction a rational judicial response since there was no change in the law or facts since the prior four decisions in the case. *See Agostini,* 521 U.S. 203. The Ohio court's flagrant disregard for existing law and

lack of basis for denying a remedy (such as sovereign immunity, retroactivity concerns, or statute of limitations barriers) is simply arbitrary and violates federal due process guarantees.

The denial of a remedy is even more arbitrary when considered in light of other state supreme courts who have considered remedies for unconstitutional school funding. These courts have not denied or frozen relief, but to the contrary, have adopted more specific remedial measures in order to ensure compliance.[4] The Ohio Supreme Court's arbitrary denial of an adequate remedy in violation of due process conflicts with the holdings of other state supreme courts which have recognized the requirement of adequate relief and accordingly, have imposed meaningful remedial measures. Such a conflict among sister state supreme courts further supports this Court's consideration of the federal due process issue. *See* S. Ct. R. 10(b).

Compounding the denial of the constitutionally-required remedy is the Ohio court's flagrant arbitrariness in first

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[4] *E.g. Campaign for Fiscal Equity, Inc. v. New York,* 2003 N.Y. slip op. 15615, 2003 WL 21468502 (N.Y. June 26, 2003) ("[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them. Surely there is a remedy more promising, and ultimately less entangling for the courts, than simply directing the parties to eliminate deficiencies, as the State would have us do."); *Tennessee Small School Systems v. McWherter,* 91 S.W.3d 232, 233 (Tenn. 2002) (reviewing adequacy of legislature's compliance with ordered remedy and imposing additional relief in third supreme court decision in the case); *Abbott v. Burke,* 575 A.2d 359, 385-91 (N.J. 1990); *Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989).

promising injunctive relief, and then switching to deny any such relief. *See Reich v. Collins*, 513 U.S. 106 (1994). The right to a particular remedy in this case vested when the Ohio Supreme Court first announced the injunction in 1997. Its repeated endorsements of the same injunction further entrenched the expectations of the plaintiffs to affirmative relief and to this particular injunction. The Court then abruptly switched five months after the last affirmation of the remedy and quickly terminated all relief. *DeRolph V* (App. 1a-16a). This remedial "bait and switch" is an egregious violation of due process. As this Court found in *Reich v. Collins*, while a state court has flexibility under equity as to what particular remedy it will provide for an adjudicated wrong, it may not hold out what plainly appears to be a clear and certain remedy and then declare that no such remedy exists. 513 U.S. at 108. The Ohio Supreme Court in three decisions established a clear and certain remedy for the unconstitutional school funding, and then inexplicably switched to declare that no such remedy or any other exists in the case. Such flagrant arbitrary action, this Court has held, offends the basic notions of fairness required by due process.

II. FEDERALISM IS NOT SERVED BY ALLOWING STATE COURTS TO ARBITRARILY REFUSE TO ENFORCE LEGAL RIGHTS.

The threat to federalism raised by the Ohio Supreme Court's denial of a meaningful remedy raises a serious legal question that should be addressed by this Court. While this Court is appropriately cautious in reviewing state court action, this case constitutes blatant unconstitutional action by a state court that demands the intervention of this Court. *See Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (reviewing state court injunction for violation of state law found to violate due process and equal protection); *Reich*, 513 U.S. at 106

(reviewing state court remedy that failed to provide meaningful relief); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) (reviewing state court injunction alleged to violate federal Constitution); *McKesson,* 496 U.S. at 18 (reviewing state court injunction providing inadequate remedy in violation of federal due process); *Mitchum v. Foster*, 407 U.S. 225 (1972) (reviewing state court injunction for violation of state law where decree raised federal constitutional issues); *see* 28 U.S.C. 2283 (2000) (exception to Anti-Injunction Act authorizes federal courts to intervene in state court proceedings to redress constitutional harms committed by state actors).

The danger from action like that of Ohio's highest court is that state courts will not viewed as a co-equal partner in the federal system for the enforcement of legal rights. Our judicial system – both federal and state – is premised on the universally-accepted principle that court judgments have meaning and that judicial pronouncements will be backed up by all necessary enforcement actions that may be required to ensure compliance with the law. Without remedies and remedial enforcement, rights are mere ideals that need not be followed. *Florida v. Georgia,* 58 U.S. 478 (1854) ("The essence of a right is, that it may be exercised contentiously, adversely. *Ubi jus ibi remedium.* Not that it be a mere "favor to be granted or withheld by any litigant."); Thomas, *Remedial Rights, supra* at 687-94. The enforcement component of a remedy is its critical aspect that distinguishes it from an idea and actualizes the right in a tangible manner:

> The power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no

> remedy, although a clear and undeniable right should be shown to exist.

Kendall v. United States, 37 U.S. (12 Pet.) 524, 623 (1838). Neutralizing a remedy by eliminating its enforcement mechanisms and converting it into a mere pronouncement of favored behavior effectively nullifies the attendant right and deprives the courts of the authority and respect necessary to protect our legal rights.

Such a nullification of state constitutional rights was perpetuated in this case by the Ohio Supreme Court. The Court's denial of an enforceable remedy rendered the state constitutional guarantee a mere aspiration rather than an operative right. Yet the Court previously held, to the contrary, that the constitution's education provision was not merely an ideal or a political question, but rather, was a directive guarantee. *DeRolph I*, 677 N.E.2d at 737, 740. Indeed, the Ohio court itself acknowledged the danger of judicial nullification of rights:

> [W]hile it is for the General Assembly to legislate a remedy, courts *do* possess the authority to enforce their orders, since the power to declare a particular law or enactment unconstitutional must include the power to require a revision of that enactment, to ensure that it is then constitutional. If it did not, then the power to find a particular act unconstitutional would be a nullity.

DeRolph II, 728 N.E.2d at 1002. These words, however, ring hollow in light of the subsequent action of the Court, which did in fact nullify the right and amend the state constitution to delete the right to a thorough and efficient education. The Court achieved a *de facto* constitutional

amendment removing the educational guarantee which has been an important part of the Ohio Constitution since 1851. 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51, 702 (1851); *see* Molly O'Brien & Amanda Woodrum, *The Constitutional Common School*, CLEV. STATE L. REV. (forthcoming 2003) (detailing historical origins of Ohio's constitutional right to a thorough and efficient education), *available at* www.uakron.edu/law/lawfaculty/obrien.php. The educational provision was reconsidered twice by constitutional conventions in 1874 and 1912, and both times it was endorsed and re-approved as a critical value for the state. O'Brien & Woodrum, *supra* pt. III.

Disputes over remedies provide a convenient way for dissenters to resist conformance with legal guarantees. Frank H. Easterbrook, *The Limits of Judicial Power in Ordering Remedies: Civil Rights and Remedies*, 14 HARV. J.L. & PUB. POL'Y 103 (1991) ("Most disputes over remedies in civil rights cases have nothing to do with remedies and everything to do with substantive entitlements."); Paul Gewirtz, *Remedies and Resistance,* 92 YALE L. J. 585, 588 (1983) ("Criticism of a remedy, therefore, may reflect criticism of the underlying right."). Courts can pronounce rights, but then default in the remedy to avoid a politically unpopular result. Defendants learn they can simply defy court orders and refuse to comply with the court directives. In so doing, the dissenters are able practically to neutralize established rights with which they personally or politically disagree. Accordingly, this Court has emphasized that compliance with judicial remedies is mandatory. *Cooper v. Aaron*, 358 U.S. 1 (1958); *cf. Middlesex County Sew. Authority v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 24 (1981) ("For rules are meant to be obeyed, and those who violate them should be held

responsible for their misdeeds."). A remedy cannot be used, as the Ohio Supreme Court did, as a mechanism to circumvent democratically-created and constitutionally-protected legal guarantees.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 03-245

IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

DALE R. DE ROLPH, ET AL., *Petitioners*

v.

THE STATE EX REL. STATE OF OHIO, *Respondent.*

On Petition for Writ of *Certiorari* to the Supreme Court of Ohio

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INTEREST OF THE AMICI[1]

The National School Boards Association (NSBA) is a nonprofit federation of state associations of school boards across the United States. It represents the 95,000 school board members across the nation who, in turn, serve America's 15,000 public school districts. Adequacy of funding for these districts is probably the single most important issue in education today. NSBA has consistently supported school finance approaches that foster excellence in student achievement for all children.

The Association of School Business Officials International (ASBO) is an educational association representing more than 6,300 members who are the professionals employed in the management of schools. The mission of ASBO is to provide programs and services to promote the highest standards of school business management practices, professional growth, and the effective use of educational resources.

The Horace Mann League was founded in 1922 to perpetuate the ideals of Horace Mann, the founder of the American public school system. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a necessary unifying and dynamic influence in American life.

National PTA is the largest volunteer child advocacy organization in the United States, with more than six million members. A not-for-profit association of

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[1] The *Amici* file this brief with the consent of both parties. Letters attesting to their consent are filed with this brief. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amici,* their members, or their counsel, made a monetary contribution for the preparation or submission of this brief.

parents, educators, students, and other citizens active in their schools and communities, PTA is a leader in reminding our nation of its obligations to children. Since its founding in 1897, National PTA has prided itself in being a powerful voice for children, a relevant resource for parents, and a strong advocate for public education.

The New York State School Boards Association (NYSSBA) is a not-for-profit membership organization in the State of New York. NYSSBA represents approximately six hundred ninety-five (695) of seven hundred and forty-two (742) public school districts in New York State, or approximately ninety-four percent (94%) of all New York public school districts. NYSSBA has been actively involved in school finance litigation in the State of New York in *Campaign for Fiscal Equity v. State*, 2003 N.Y. Slip Op. 15615 (N.Y. June 26, 2003).

People For the American Way is a non-partisan national organization with more than 600,000 members and supporters dedicated to promoting civil and constitutional rights and effective public education. People For has supported measures to improve and strengthen public education, while opposing proposals like vouchers that would harm public education, in Ohio and across the country. People For joins this brief because of the importance of ensuring that where a right to adequate, effective public education is established under state law, it is crucial that an effective remedy for violation of that right be available as well.

The Public Education Network (PEN) is a national organization of local education funds (LEFs) and individuals working to build public demand and mobilize resources for quality public education in low-income communities across the nation. PEN believes that public education is the cornerstone of our democratic way of life.

PEN seeks to strengthen public education, and opposes policies and practices that detract from it. PEN and its 81 LEF members work in 31 states and the District of Columbia in more than 1,200 school districts serving almost 11 million children, approximately 20% of the public school student population. Many PEN members are located in states currently or previously involved in school finance litigation.

The United Church of Christ (UCC) Justice and Witness Ministries coordinates and implements the denomination's justice advocacy mandates on behalf of 1.4 million members in over 6,000 congregations in the United States and Puerto Rico. The UCC has historically worked to strengthen public schools and to oppose policy that weakens the nation's public education system including inadequate funding. In 2001, the UCC's General Synod, its highest denominational governing assembly, called upon its members and congregations to work to safeguard public education as a civil right.

Amici submit this brief to call attention to law and arguments that may assist this Court. *Amici* are all organizations dedicated in some way to ensuring the right of all America's children to obtain a good basic education and the continued ability of public school districts to provide such. In the balance is the access of future generations of students to an education that will enable them to develop into productive citizens and guarantors of the democratic principles upon which this nation was founded.

SUMMARY OF THE CASE

The central issue in this case is whether the children of the State of Ohio, or any other state, have the

ability to obtain a remedy for the violation of their state constitutional right to education. *Amici* incorporate the facts as outlined in the brief of Petitioners.

SUMMARY OF THE ARGUMENT

Petitioners, school children and school districts, should not be denied enforcement of the state constitutional right to an adequate education recognized by the Supreme Court of Ohio.

ARGUMENT

I. The Ohio Supreme Court's decision threatens the viability of public education as a cornerstone of America's democratic society.

Public education serves a vital role as a cornerstone of America's democratic society. Our nation's founding leaders believed that the success of American democracy depended on the development of an educated citizenry that would vote wisely, protect its rights and freedoms, rout out political corruption, and keep the nation secure from internal and external threats to democracy. Early leaders generally embraced the concept and words of Thomas Jefferson:

> [A] people who mean to be their own Governors must arm themselves with the power which knowledge gives. I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and

> happiness. * * * Preach my dear sir, a crusade against ignorance; establish and improve the law for education of the common people.

BERNARD MAYO, JEFFERSON HIMSELF 89 (University Press of Virginia, 1942).

Educational leaders have recognized the paramount role of education in the life of our nation. As stated by Horace Mann:

> Under a republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge; such an education is indispensable for the civil functions of a witness or a juror; is necessary for the voter in municipal affairs; and finally, for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.

HORACE MANN, TENTH REPORT (1846).

This Court has also recognized the importance of public education to preparing our nation's children.

> Today education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our

> democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Brown v. Board of Education, 347 U.S. 483, 493 (1954).

In *Plyler v. Doe*, 457 U.S. 202 (1982), this Court found that although education is not specifically set forth as a federal constitutional right, it "has a fundamental role in maintaining the fabric of our society" by preparing citizens to participate in a democracy.

> [T]he public schools [are] a most vital civic institution for the preservation of a democratic system of government and ... the primary vehicle for transmitting the values on which our society rests. ... In sum, education has a fundamental role in maintaining the fabric of our society.

Id. at 221.

Most recently in *Grutter v. Bollinger,* 123 S. Ct. 2325 (2003), this Court reflected on the importance of elementary and secondary education.

> We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society." [citations omitted]

Id. at 2340.

These passages correctly note that public education is vital not only to the maintenance of our democracy but also to the vitality of our economy. This has never been truer than it is today as the infrastructure of our nation's economy becomes increasingly information reliant. Further an adequate education is necessary to make viable most other constitutional rights, such as freedom of expression and assembly. It is thus an underlying right.

II. The Ohio Supreme Court's decision renders the state constitutional right to an education meaningless.

A. States have recognized public education as a constitutional right.

This Court declined to find an equal protection violation for the inequitable distribution of educational opportunities in *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1 (1973). It found there was no fundamental right to education in the United States Constitution and deferred instead to state systems. Many state supreme courts have ruled that their citizens have a right to an education based on state constitutional provisions.

Petitioners here are seeking enforcement of that very right as recognized by the Ohio Supreme Court. Review by this Court is imperative, for without it the students of Ohio have no remedy for the violation of their state constitutional right to an education.

The action of the Ohio Supreme Court has immense implications when one considers that all fifty states have a state constitutional clause requiring the state to provide elementary and secondary education for its citizens.[2]

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[2] ALA. CONST. art. XIV, § 256, as amended by ALA. CONST. Amend. 111 (a liberal system of public schools); ALASKA CONST. art. VII, § 1 (a system of public schools); ARIZ. CONST. art. XI, § 1 (a general and uniform public school system); ARK. CONST. art. XIV, § 1 (a general, suitable and efficient system of free public schools); CAL. CONST. art. IX, § 5 (a system of common schools); COLO. CONST. art. IX, § 2 (a thorough and uniform system of free public schools); CONN. CONST. art. VIII, § 1(free public elementary and secondary schools); DEL. CONST. art. X, § 1 (a general and efficient system of free public schools); FLA. CONST. art. IX, § 1 (a uniform system of free public schools); GA. CONST. art. VIII, § 1, para. 1 (an adequate public education); HAW. CONST. art X, § 1 (a statewide system of public schools); IDAHO CONST. art. IX, § 1 (a general, uniform and thorough system of public, free common schools); ILL. CONST. art. X, § 1(an efficient system of high quality public educational institutions and services); IND. CONST. art. VIII, § 1 (a general and uniform system of Common Schools); IOWA CONST. art. IX, § 3 (encourage by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement); KAN. CONST. art. VI, § 1 (establishing and maintaining public schools); KY CONST. § 183 (an efficient system of common schools); LA. CONST. art. VIII, § 1 (a public educational system); ME. CONST. art. VIII, pt. 1, § 1 (the Legislature are authorized and it shall be their duty to require, the several towns to make suitable provision at their own expense, for the support and maintenance of public schools); MD. CONST. art. VIII, § 1 (a thorough and efficient system of free public schools); MASS. CONST. pt. II, ch. V, § II (to cherish the interests of literature and the sciences, and all seminaries of them; especially the University at Cambridge, public schools and grammar schools in the towns); MICH. CONST. art. VIII, §

Some states merely pronounce the importance of education, while others specifically mandate the maintenance of an educational system. Many use similar patterns of language in these provisions, e.g., requiring a "thorough and efficient," "uniform system" of public education for all students, or as in Ohio a "thorough and efficient system of common schools."

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2 (a system of free public elementary and secondary schools); MINN. CONST. art. XIII, § 1 (a general and uniform system of public schools); MISS. CONST. art. VIII, § 201 (establishment, maintenance and support of free public schools); MO. CONST. art. IX , § 1(a) (establish and maintain free public schools for gratuitous instruction); MONT. CONST. art. X , § 1(3) (a basic system of free instruction in the common schools); NEV. CONST. art. XI, § 2 (a uniform system of common schools); N.H. CONST. pt. 2, art. 83 (cherish the interest of literature and the sciences, and all seminaries and public schools); N.J. CONST. art. VIII, § 4, para. 1 (a thorough and efficient system of free public schools); N.M. CONST. art. XII, § 1 (a uniform system of free public schools); N.Y. CONST. art. XI, § 1 (a system of free common schools); N.C. CONST. art. IX, § 2(2) (a general and uniform system of free public schools); N.D. CONST. art. VIII, § 2 (a uniform system of free public schools); OHIO CONST. art. VI, § 2 (a thorough and efficient system of common schools); OKLA. CONST. art. XIII, § 1 (a system of free public schools); ORE. CONST. art. VIII, § 3 (a uniform, and general system of public education); R.I. CONST. art. XII, § 1 (promote public schools); S.C. CONST. art. XI, § 3 (a system of free public schools); S.D. CONST. art. VIII, § 1 (a general and uniform system of public schools); TENN. CONST. art. XI, § 12 (a system of free public schools); TEX. CONST. art. VII, § 1 (an efficient system of public free schools); UTAH CONST. art. X, § 1 (establishment and maintenance of the state's education system); VT. CONST. ch. II, § 68 (a competent number of schools ought to be maintained in each town); VA. CONST. art. VIII, § 1 (a system of free public elementary and secondary schools); WASH. CONST. art. IX, § 2 (a general and uniform system of public schools); W. VA. CONST. art. XII, § 1 (a thorough and efficient system of free schools); WIS. CONST. art. X, § 3 (the establishment of district schools, which shall be as nearly uniform as practicable); WYO. CONST. art. VII, § 1 (a complete and uniform system of public instruction).

B. Enforcement of this right has been sought through school funding litigation across the nation.

In school funding cases across the nation, plaintiffs have exerted their rights in state courts under these clauses defining the state's obligation to provide elementary and secondary education to its citizens. Whatever the actual language, plaintiffs have argued that the intent is to impose on the state a constitutional obligation to provide an "adequate" or basic education to every student. In many of these states, the state supreme court has recognized that this provision creates a state constitutional right to education.[3]

The courts in many of these cases have found the constitutional provisions require access to an adequate education, which is not necessarily an equal distribution of resources to all school districts. The focus has shifted from equity – determining a way to distribute the money equitably across school districts in a state—to adequacy – determining whether the state has provided sufficient

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[3] *E.g.*, Alabama Coalition for Equity v. Hunt, Opinion of the Justices No. 338 , 624 So.2d 107, 111 (Ala. 1993); Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806, 811 (Ariz. 1994); Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973); Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Rose v. Council for Better Educ., 790 S.W.2d 186, 214 (Ky. 1989); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993); Bismarck Pub. Dist. No. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994); Tennessee Small Sch. Sys v. McWherter, 851 S.W.2d 139, 151 (Tenn. 1993); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994); Pauley v. Bailey, 255 S.E.2d 859, 878 (W.Va. 1979); Kukor v. Grover, 436 N.W.2d 568, 579 (Wis. 1989); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980), *cert denied*, 449 U.S. 824 (1980).

resources to the system to ensure all students have an opportunity to a minimum level of education. Educational adequacy focuses on how much money is needed to provide to students the opportunity to achieve certain educational results or achievement levels.[4] These cases have overshadowed the concern for the equitable distribution of money across states.

When plaintiffs are successful in exerting a constitutional right to an adequate education, the court must define the contours of that right. For example, the North Carolina Supreme Court in *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997), defined the right as access to an education that provides students:

- The ability to read, write and speak English with enough knowledge of math and science to "function in a complex and rapidly changing society."
- Sufficient knowledge of geography, history and basic economic and political systems to make informed choices about the community, state and nation.
- Sufficient skills to engage in post-secondary education and training.
- The ability to compete with others on an equal basis in "formal education or gainful employment."

Nonetheless millions of students in grades K-12 nationwide are currently being denied this substantive right because of inadequate funding to these educational systems. In 2001-02 the United States spent a total of

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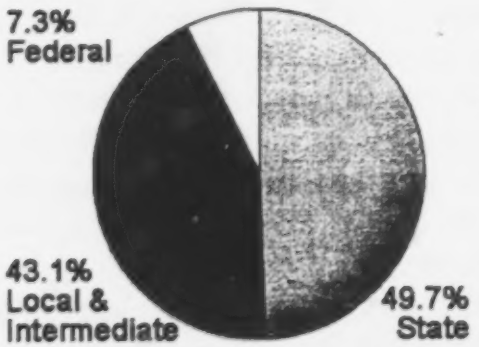
[4] Determining an amount necessary to reach specific academic benchmarks, a challenge made even more immediate by the federal legislation, *No Child Left Behind Act of 2001*, Pub. L. No. 107-110, 115 Stat. 1425.

$410 billion of federal, state and local tax money on public schools, a sum woefully inadequate to the task. The federal government provides the smallest percentage of school funds not in keeping with its imposition of high cost mandates, such as special education and *No Child Left Behind*. The state governments contribute approximately half of elementary and secondary school funding, with local governments providing over 40%. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, COMMON CORE OF DATA, *National Public Education Financial Survey*" 2000-2001, *at* http://nces.ed.gov/edfin/graphs/topic.asp?INDEX=4



National Center for Education Statistics, 2000-01

These overall percentages are not replicated in every state, and average per pupil spending varies widely from state to state, ranging from a high of $11,248 in New Jersey to a low of $4,674 in Utah. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, COMMON CORE OF DATA, *National Public Education Financial Survey*, 2000-2001. These variances occur because state and local governments fund their public schools systems through a hodgepodge of property-

related tax schemes that often lack parity and stability, and the ability to raise sufficient resources.

This has lead to widespread school finance litigation across the nation. State school finance systems have been attacked as unconstitutional under state constitutions in the overwhelming majority of the states since this Court's decision in *Rodriguez*. In these cases state financing schemes have been struck down by numerous state supreme courts, and in one case, the entire system of education, not just the finance scheme, was found to be unconstitutional. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 215 (Ky. 1989).

Thirty-four states have had, or are currently involved in, adequacy suits such as the case at hand.[5] In

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[5] **Alabama**, Harper v. Hunt, Op. of Justices, 624 So.2d 107 (Ala. 1993); **Alaska**, Matanuska-Susitna Borough Sch. Dist. v. State, 931 P.2d 391 (Alaska 1997); **Arizona**, Shofstall v. Hollins, 515 P.2d 590 (Ariz. 1973); Roosevelt Elementary Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994); **Arkansas**, Dupree v. Alma Sch. Dist., 651 S.W.2d 90 (Ark. 1983); Tucker v. Lake View Sch. Dist., 917 S.W.2d 530 (Ark. 1996); Lake View Sch. Dist. v. Huckabee, 10 S.W.3d 892 (Ark. 2000); **California**, Serrano v. Priest, 557 P.2d 929 (Cal. 1977); **Colorado**, Lujan v. Board of Educ., 649 P.2d 1005 (Colo. 1982); **Connecticut**, Horton v. Meskill, 376 A.2d 359 (Conn. 1977); **Florida**, Coalition for Adequacy and Fairness in School Funding Inc. v. Chiles, 680 So.2d 400 (Fla. 1996); **Idaho**, Idaho Sch. for Educ. Opportunity v. State, 976 P.2d 913 (Idaho 1998); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Idaho Sch. for Equal Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho, 1993); **Illinois**, Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Lewis E. v. Spagnolo, 710 N.E.2d 798 (Ill. 1999); **Iowa**, Coalition for a Common Cents Solution v. Iowa, No. N/A (filed April 2002); **Kentucky**, Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); **Louisiana**, Charlet v. State, 713 So.2d 1199 (La Ct. App. 1998); **Maryland**, Hornbeck v. Board of Education, 458 A.2d 758 (Md. 1983); **Massachusetts**, McDuffy v. Secretary, 615 N.E.2d 516 (Mass. 1993); **Minnesota**, Skeen v. State, 505 N.W.2d 299 (Minn. 1993); **Missouri**, Committee for Educ.

these cases plaintiffs have sought relief from substandard education programs resulting from state school funding systems. These plaintiffs then must return through the courts for the enforcement of their constitutional rights.

Equality v. State, 878 S.W.2d 446 (Mo. 1994); **Montana**, Woodahl v. Straub, 520 P.2d 776 (Mont. 1974); Helena Elementary Sch. Dist. v. State, 769 P.2d 684 (Mont. 1989); **Nebraska**, Gould v. Orr, 506 N.W.2d 349 (Neb. 1993); **Nebraska**, Douglas County Sch. Dist. v. Johanns, No. 03-1028, (filed June 2003); **New Hampshire**, Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); **New Jersey**, Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); **New Mexico**, Zuni Sch. Dist. v. State, No. 98-14-II (filed October 1999); **New York**, Levittown Sch. Dist. v. Nyquist, 439 N.E. 2d 359 (N.Y. 1982); Campaign for Fiscal Equity v. State, 655 N. E. 2d 661 (N.Y. 1995); Campaign for Fiscal Equity v. State, 2003 N.Y. Slip Op. 15615 (N.Y. 2003); **North Carolina**, Britt v. North Car. State Bd. of Educ., 357 S.E.2d 432 (1987); Leandro v. State, 488 S.E.2d 249 (N.C. 1997); **Ohio**, Board of Educ. of Cincinatti v. Walter, 390 N.E.2d 813 (Ohio 1979); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); DeRolph v. State, 786 N.E.2d 60 (Ohio 2003); **Oklahoma**, Fair Sch. Finance Council v. State, 746 P.2d 1135 (Okla. 1987); **Pennsylvania**, Danson v. Casey, 399 A.2d 360 (Pa. 1979); Pennsylvania Ass'n of Rural and Small Sch. v. Ridge, 737 A.2d 246 (Pa. 1999); **South Carolina**, Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999); **South Dakota**, Bezdicheck v. State, CIV 91-209 (S.D.1994); **Tennessee**, Tennessee Small Sch. System v. McWherter, 851 S.W.2d 139 (Tenn. 1993); **Washington**, Seattle Sch. Dist. v. State, 585 P.2d 71 (Wash. 1978); **West Virginia**, Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979); Pauley v. Bailey, 324 S.E.2d 128 (W.Va. 1984); Pauley v. Gainer, 353 S.E.2d 318 (W. Va. 1986); **Wisconsin**, Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989); Vincent v. Voight, 614 N.W.2d 388 (Wis. 2000); **Wyoming**, Washakie County Sch. Dist. v. Herschler, 606 P.2d 310 (Wyo. 1980); Campbell County Sch. Dist. v. State, 907 P.2d 1238 (Wyo. 1995). Other states have experienced school litigation based on equity, rather than adequacy theories.

C. Without enforcement of a judicial order, the right to an education becomes meaningless.

The duty of the courts to require compliance with orders is firmly established as a fundamental tenet in American due process. Two hundred years ago in *Marbury v. Madison*, 5 U.S. 137 (1803), this Court recognized the inherent rights of citizens to seek a remedy through judicial process. "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded". *Id.* at 163. If a court rules a state statute unconstitutional, it follows that the legislature must be required to rectify the constitutional error. If a court of competent jurisdiction declines to or is forbidden to oversee the legislative response, it in effect perpetuates an unconstitutional act. Our judicial system strives to avoid this by making courts subject to appeals to higher courts.

The opinion of the Ohio Supreme Court denies Petitioners access to the judicial processes of the state, thus depriving them of meaningful enforcement of the constitutional rights afforded to them. Thus, review by this Court is necessary in this case to ensure that our justice system functions with integrity.

CONCLUSION

In cases such as these, it is especially critical to understand "the impact of legal rules on human lives, that the law is not an abstract concept removed from the society it serves, and the judges, as safeguarders of the Constitution, must constantly strive to narrow the gap

between the ideal of equal justice and the reality of social inequality." SANDRA DAY O'CONNOR & CRAIG JOYCE, THE MAJESTY OF THE LAW (Random House 2003).

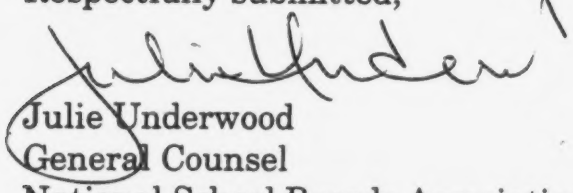
This case affects not only 1.8 million students in the State of Ohio, but also potentially 47 million students nationwide. Litigation similar to *DeRolph* has played out in most of the states of this nation. Plaintiffs in these cases seek redress of state constitutional violations. Twenty-four state supreme courts have found such a violation. These plaintiffs must then have some method to enforce their constitutional right to an adequate education. Without enforcement state legislatures will be able to sit idly by and not make the tough political and economic choices necessary to invest sufficiently in the children of their state. This case is about protecting the future of America's children.

Our nation has historically relied on public schools to provide an education to all children, to equip students with the skills they need to participate in a democracy, and to be an instrument of harmony in our society. A quality education available to all of America's children, regardless of where they live is essential to the survival and prosperity of our nation and democracy.

Our schools must be sufficiently funded to provide our children with an adequate education. To recognize that children have a state constitutional right to education and then provide no mechanism for them to redress a violation of that right, in essence provides no right at all, an empty promise which perpetrates a great injustice upon future generations. As citizens of the United States, these petitioners have a right to enforcement of their rights. It is the necessary function of a state supreme court to interpret the state constitution and protect a citizen's rights under it. When a state

supreme court unlawfully deprives their citizens of a remedy after recognizing the violation of a right, it is appropriate for this Court to review that decision.

Respectfully submitted,



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In the Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF AMICI CURIAE
The Honorable Ted Strickland, Sherrod Brown, Tim Ryan, Stephanie Tubbs Jones, Marcy Kaptur, Dennis Kucinich, and Chaka Fattah, Members of Congress, in Support of Petitioners

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INTEREST OF AMICI CURIAE

As elected federal representatives of students and families in Ohio and Pennsylvania who suffer from inadequate educational opportunities due to inequitable school funding, U.S. Representatives Ted Strickland, Sherrod Brown, Tim Ryan, Stephanie Tubbs Jones, Marcy Kaptur, Dennis Kucinich and Chaka Fattah have a real and substantial interest in the issues raised in this petition.[1] This brief illustrates not only the legal necessity of U.S. Supreme Court review of Ohio's recent school funding decision, but also provides pertinent information on the fiscal challenges faced by schools in districts represented by these Members of Congress.

Members of Congress have long recognized the need to level the educational playing field as illustrated by passage of the Elementary and Secondary Education Act of 1965, which established the Title I, Part A, non-discretionary program with the purpose ensuring that all children have a "fair, equal and significant opportunity to obtain high-quality education...." 20 U.S.C. § 6301 (2003). The Act seeks to achieve this purpose in part by closing the achievement gap between "disadvantaged children and their more advantaged peers." *Id.* This is the largest federal elementary and secondary education assistance program in existence.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. In accordance with this Court's Rule 37.6, amici curiae represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the amici curiae, its members, or its counsel made monetary contributions to the preparation or submission of this brief.

Sadly, the problems confronting disadvantaged school districts and students at the local level are being exacerbated by new federal requirements mandated under the No Child Left Behind Act of 2001. Pub. L. No. 107-110. These new requirements have been imposed on local school districts, but not adequately funded by the federal government. These new federal mandates, combined with current funding inequities, will ironically leave disadvantaged students farther and farther behind.

Amici Curiae enter this appearance on behalf of the petitioners, public school students, parents, teachers, school boards and school administrators in their congressional districts.

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Amici Curiae file this pleading to inform the Court of the severe impacts on children, their families and society as a whole of the underfunding of economically poorer Ohio school districts and the importance to the Rule of Law that judicial orders be enforced. The underlying determination that the Ohio funding mechanism violates the Ohio State Constitution has been determined and is not at issue, but the Ohio Supreme Court has ordered that the lower state courts take no actions to enforce these determinations, turning adjudications of unconstitutionality into advisory pronouncements. Although it is not to be denied that *some* remedies for law violations may be found inequitable, ill advised or even beyond the powers of a court, for an appellate court to deny the *possibility* of *any* remedy for a wrong *in advance of consideration of possible lower court rulings on remedy*, sanctions and ensures the non-enforceability of constitutional (and other) legal requirements. This is a matter that warrants this Court's review.

STATEMENT OF THE CASE

After nearly a decade of litigation in which the Ohio Supreme Court has repeatedly declared the current public school funding system in Ohio unconstitutional,[2] the Ohio Court on May 16, 2003, issued a writ of prohibition effectively barring any remedy for the 1.8 million school children in Ohio, who are irreparably harmed by this unjust and inadequate system.[3] *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (2003).

In July of 1994, Perry County Common Pleas Judge Linton Lewis first held, in an unreported decision, that Ohio's school funding system, which primarily relies on property taxes, violated § 2, Article VI of the Ohio Constitution. The Ohio Supreme Court ultimately upheld the trial court's decision on March 24, 1997. *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) (*DeRolph I*). In

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[2] *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) (*DeRolph I*) (declaring public school funding in Ohio unconstitutional and ordering injunctive relief); *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) (*DeRolph II*) (determining that the State remained in violation and reiterating order that the State undertake a complete systematic school funding overhaul); *DeRolph v. State*, 93 Ohio St. 3d 309, 754 N.E.2d 1184 (2001) (*DeRolph III*) (ordering specific changes to the State's school funding formula); *DeRolph v. State*, 93 Ohio St.3d 628, 758 N.E.2d 1113 (2001) (ordering mediation); *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) (*DeRolph IV*) (reiterating for the fourth time that the school funding system is unconstitutional).

[3] *See* The Ohio Department of Education (visited Sept. 11, 2003) <http://www.ode.state.oh.us/data/Fall_enroll_blgd_grade/BLDG_2003.XLS> for data on school enrollment in Ohio.

DeRolph I, the Ohio Supreme Court determined that the plaintiffs' schools were "starved for funds, lacked teachers, buildings, and equipment, and had inferior educational programs, and that their pupils were being deprived of educational opportunity." *Id.* at 205, 677 N.E.2d at 742. As the majority opinion of the Ohio State Supreme Court in *DeRolph I* stated, "By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio's public school financing scheme must undergo a complete systematic overhaul." *DeRolph I* at 212, 677 N.E.2d at 747. After the trial court concluded that the State had failed to comply with the requirements of *DeRolph I, DeRolph v. State*, 98 Ohio Misc.2d 1, 712 N.E.2d 125 (1999), the State again appealed to the Ohio Supreme Court. *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) (*DeRolph II*). In determining that the State had not met its *DeRolph I* mandate, the Ohio Court reiterated its directive that the legislature provide a complete systematic overhaul of the school funding system in *DeRolph II*. *Id.* The following year, the Court again held the school funding system unconstitutional in a decision which set forth specific changes necessary to bring the system into compliance with prior Court decisions. *DeRolph v. Ohio,* 93 Ohio St.3d 309, 754 N.E.2d 1184, 1201 (2001) (*DeRolph III*). When the State responded by seeking reconsideration of the *DeRolph III* decision, instead of ordering the specific changes suggested, the Ohio Supreme Court ordered mediation. *DeRolph v. Ohio*, 93 Ohio St.3d 628, 758 N.E.2d 1113 (2001). Mediation failed, and the Court again declared Ohio's school funding system unconstitutional, directing the General Assembly to "enact a school-funding scheme that is thorough and efficient as explained in *DeRolph I, DeRolph II*, and the accompanying concurrences." *DeRolph v. State*, 97 Ohio St.3d 434, 435, 780 N.E.2d 529, 530 (2002) (*DeRolph IV*).

Therefore, in four separate decisions, the Ohio Supreme Court declared the Ohio school funding system unconstitutional and directed the State to take action. For more than six years, the State has brazenly refused to comply. In the face of such refusal, the Ohio Supreme Court in *Lewis*, eliminated any hope of redress for the Ohio school children who have fallen victim to the State's belligerence.

REASONS FOR GRANTING THE WRIT

I. The Ohio Court's ruling in *Lewis* denies Ohio's school children a recognized and enforceable right in violation of Due Process and Equal Protection of the law.

State court denials of due process rights are remedial in federal courts. *Powell v. Alabama*, 287 U.S. 45 (1932). Access to the state judicial process is a constitutionally recognized right invoking the Due Process Clause of the Fourteenth Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). The right to access is dependent on importance of the subject before the court. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). The critical importance of education has been recognized in numerous rulings by this Court. *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003); *Plyer v. Doe*, 457 U.S. 202 (1982), *Goss v. Lopez*, 419 U.S. 565 (1975), *Brown v. Bd. of Educ.*, 347 U.S. 483, (1954).

The State of Ohio's failure to change Ohio's flawed school funding system and the Supreme Court's subsequent writ of prohibition in *Lewis* barring any remedy, denies Due Process to the 1.8 million children who currently attend public schools in Ohio. The cost to the quality of education in Ohio is immeasurable. Currently, whether an investment is made in a child is determined solely on the basis of where he or she

lives and, more specifically, whether his or her school district has a strong or a weak property tax base. As the Ohio Supreme Court has held multiple times,[4] this system is patently unfair and does not serve the state's best interest.

The Court's dismissal came at a time when many schools and children in Ohio are suffering the consequences of inadequate funding. Nine school districts are in Fiscal Watch/Emergency and fourteen districts are in Fiscal Caution.[5] There have been 2,037 tax levies placed on Ohio ballots in the last five years.[6] Why must we continue on the path of fighting year-to-year and levy-to-levy to fund our schools? The reason is simple: although minor changes have been made by the legislature,[7] there has not been a complete

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[4] Supra, note 4.

[5] *See* The State of Ohio Auditor (visited Sept. 11, 2003) <http://www.auditor.state.oh.us/fiscal_watch_emergency/schools_in_fiscal_watch_emergency.pdf> for a list of schools in Fiscal Watch/Emergency; The State of Ohio Auditor (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/fiscal_accountability/fiscal_caution_districts.asp> for a list of schools in Fiscal Caution.

[6] *See* The Ohio Department of Education's School Finance, Finance and Management Services, Election Results data (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/election_results/Aug_2003_election_summary.asp> for levies that have been placed on Ohio ballots in the last five years. As the Ohio Supreme Court stated in *DeRolph II*, "Requiring school districts to seek additional tax increases to make up for lost revenue is something that should be avoided, especially in view of our holding in *DeRolph I*, which required overreliance on local property taxes to be eliminated." *DeRolph* at 31, 728 N.E. 2d at 1016.

[7] *See* The Ohio Department of Education's report about Ohio's School Foundation Funding Program (visited Sept. 12, 2003) <http://www.ode.state.oh.us/school_finance/PDF/2004_SF-

systematic overhaul of Ohio's public school financing scheme as previously ordered by the Ohio Supreme Court.

An examination of pertinent statistics makes it plain that Ohio's school funding system, still based primarily on local property taxes,[8] is shortchanging many children living in poverty-stricken areas. By cross-referencing the list of 2001 tax returns by school district with the 2002 state report card ratings of Ohio school districts, [9] it is obvious that poorer school districts are at a distinct and unfair disadvantage. The state of Ohio assigns each school district a report card rating based on twenty-two criteria. [10] Among the school districts whose adjusted gross income ranked in the top forty,[11] thirty-five received ratings of excellent.[12] The remaining five

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3_LINEBYLINE.pdf> for a description of the changes made to the state's funding system by the Ohio General Assembly.

[8] 48.39% of school revenue comes from local property taxes, 45.73% is provided by the State, and 5.88% comes from the federal government. Ohio Department of Education, Office of Policy and Research Analysis, Simulation Unit.

[9] *See* The Ohio Department of Taxation's Tax Data Series (visited Sept. 11, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

[10] These criteria include the school district's overall performance in subjects on the 4th, 6th and 9th grade proficiency tests, the district's attendance rate, and the district's graduation rate. Districts that meet 21-22 criteria receive a rating of excellent, those which meet 17-20 receive an effective rating, those meeting 11-16 are given a rating of continuous improvement, those meeting 7-10 standards are place on academic watch, and those meeting 6 or fewer criteria are classified as academic emergency.

[11] *See* The Ohio Department of Taxation's Tax Data Series (visited July 16, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

[12] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited July 28, 2003)

districts in the top thirty received effective ratings.[13] The numbers for the forty school districts at the other end of the spectrum, fifteen of which are in Congressman Strickland's district,[14] are quite different. Only one school district received an excellent rating, and only six received effective ratings.[15] Twenty-one school districts received ratings of continuous improvement.[16] Unfortunately, three of these districts received ratings of academic watch,[17] and nine of the forty school districts from the bottom forty income levels received the very lowest possible rating, academic emergency.[18] Additionally, of the nine school districts

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<http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[13] *See* The Ohio Department of Taxation's Tax Data Series (visited July 16, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district; *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited July 28, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[14] Schools districts whose adjusted gross income falls in the bottom 40 in the state and which are in Congressman Strickland's office are: Barnesville Exempted Village, Bellaire City, Bridgeport Exempted Village, Caldwell Exempted Village, Dawson-Bryant Local, East Liverpool City, Ironton City, Martins Ferry City, Meigs Local, Rock Hill Local, Steubenville City, Symmes Valley Local, Trimble Local, Union Local and Wellsville Local.

[15] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited July 28, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[16] *Id.*

[17] *Id.*

[18] *See* The Ohio Department of Taxation's Tax Data Series (visited July 16, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district; *See* The Ohio Department of

currently in Fiscal Watch/Emergency in Ohio, three are located within the boundaries of the 17th Congressional District represented by Congressman Tim Ryan.[19] In order to receive fiscal relief through a "Fiscal Watch/Emergency" designation, school districts are required by law to petition their electorate.[20] Unfortunately, the nine school districts were unsuccessful in their attempts.

The juxtaposition between wealthy and poor school districts is also evident in Ohio's 11th Congressional District, located in eastern Cuyahoga County and represented by Congresswoman Stephanie Tubbs Jones. In 2001, the Mean Ohio Adjusted Gross Income within the Orange City School District was $55,305, ranking fifth in the state.[21] During the 2003 fiscal year, the district received an excellent rating and met twenty-two of the performance standards set by the

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Education's compilation of District Level Performance Indicators (visited July 28, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[19] School districts located in Congressman Tim Ryan's Congressional District that have received a rating of Fiscal Watch/Emergency are Lordstown Local, Massillon City, and Niles City.

[20] *See* The Ohio Department of Education's Summary of Requirements for Fiscal Watch after S.B. 345, effective 4/10/01 (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/fiscal_accountability/Fiscal_Watch.pdf> and The Ohio Department of Education's Summary of Requirements for Fiscal Emergency after S.B. 345, effective 4/10/01 (visited Sept. 11, 2003) <http://www.ode.state.oh.us/school_finance/finance_and_mgmt_svcs/fiscal_accountability/Fiscal_Emergency.pdf> for definitions.

[21] *See* The Ohio Department of Taxation's Tax Data Series (visited September 3, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

school district.[22] Moreover, the Orange City School District met its Adequate Yearly Progress goals for 2002-2003 and had a Student Graduation Rate of 97.4% for the same year.[23] Comparatively, just nine miles away from Orange City, the East Cleveland City School District reported a Mean Ohio Adjusted Gross Income of $20,031 in 2001, ranking 610th in the state.[24] The district received a rating of Academic Emergency for the 2002-2003 school year and only met six of the performance standards set by the school district.[25] The East Cleveland City School District did not meet its Adequate Yearly Progress goals for that year, and the district's graduation rate was only 52.9%.[26]

There is no doubt that students from wealthier school districts, defined as having strong property tax bases, have a significant educational advantage over those from poverty-stricken areas. This impacts many schools districts all over the state. For example, Congressman Strickland's district includes many school districts in Appalachia, one of the state's and the country's poorest regions.[27] In school districts

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[22] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited Sept. 3, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[23] *Id.*

[24] *See* The Ohio Department of Taxation's Tax Data Series (visited Sept. 3, 2003) <http://www.state.oh.us/tax/ftp/y2cy01.pdf> for income tax data by school district.

[25] *See* The Ohio Department of Education's compilation of District Level Performance Indicators (visited Sept. 3, 2003) <http://webapp1.ode.state.oh.us/district_rating/> for state school district report card ratings.

[26] *Id.*

[27] According to the Appalachian Regional Commission, Appalachia includes all of West Virginia and parts of Alabama, Georgia,

in Belmont County, for example, the average expenditure per pupil is $6,928.[28] In other, wealthier areas, school districts are able put more money into each student's education, thereby providing those students with a more complete educational experience. In Cuyahoga County, which includes many of Cleveland's wealthy suburbs, average expenditure for each [or per] student in fiscal year 2002 was $10,203.[29] Among individual school districts, the contrast is even more glaring. While expenditure per pupil in Belmont County's Shadyside Local School district is $6,053, expenditure per pupil in Beachwood City School District in Cuyahoga County is $16,425.[30] Such vast disparities are unnerving but must be acknowledged because they illustrate the disastrous effects of Ohio's flawed school funding system.

Inequitable school funding is not only an Ohio problem. In Pennsylvania, the state with the fourth highest per pupil gap, Lower Marion School District spends $12,677 per student in comparison with Philadelphia City School District in Congressman Chaka Fattah's Congressional District, which spends $7,768 per student. This gap amounts to $122,725 less per year for a Philadelphia classroom of 25 students.

Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia. *See* The U.S. Census Bureau's 2000 Census Data, Population by Poverty Status in 1999 for Counties (visited Sept. 11, 2003) <http://www.census.gov/hhes/poverty/2000census/poppvstat00.html> for the percentage of residents living in poverty by county.

[28] Ohio Department of Education. Office of Policy and Research Analysis, Simulation Unit.

[29] *Id.*

[30] Ohio Department of Education. Office of Policy and Research Analysis, Simulation Unit.

These graphic disparities are illustrative of the injustice suffered by those children who are not fortunate enough to live in a wealthy school district. Children from the highest 40 income levels of Ohio schools have a 0% chance of going to a school that is on academic emergency, academic watch or continuous improvement. But children from the 40 lowest income districts are most likely to go to a school with a "continuous improvement" rating, signifying that those districts are still working toward even becoming effective. These children have a whopping 22.5% chance of going to an academic emergency school. This inequality is even more disturbing when one considers that the state of Ohio has been directed repeatedly to remedy the problem.

It is unrealistic to propose that Ohio's educational system will ever provide the exact same opportunities for each child from school district to school district. While such an idyllic system is desirable, it would be nearly impossible to achieve. This is not what the plaintiffs ask for or expect. What they do demand is that the state of Ohio complies with the requirements set before it in the Ohio Constitution, as interpreted by the State's Supreme Court. Whether the funding system is constitutional is not in question -- the Supreme Court has said that the funding system is definitively not constitutional. The harm to Ohio children is real, and the implications of allowing the State to brazenly stand behind and refuse to change an unconstitutional law are momentous. It is exceedingly reasonable for the plaintiffs to seek enforcement of the Ohio Court's repeated pronouncement on Ohio's school funding system.

The Ohio Supreme Court's decision to grant the state's writ of prohibition preventing the trial judge from enforcing the Supreme Court's ruling against the state has wide-reaching implications. What this means for many Ohio school children

is that they will continue to go to school and be forced to share books. They will continue to go to school and eat lunch at their desks. They will continue to attend schools that are entirely modular and be forced to take a bus to another location for gym class. They will continue to use boiler rooms as classrooms for music and art, that is, if they are among the lucky children whose schools have been able to retain music and art programs at all. The message will be clear: even though the Ohio constitution gives every Ohio child a right to a thorough and efficient system of education, Ohio Const. art. VI § 2, children from poor districts are deemed unworthy of such constitutional protection. These children will have to take what they can get, and make do with what little they have. This is not the message we may send to our children consonant with the legal requirements that the Ohio Supreme Court has enunciated.

The superficial changes that the state has undertaken in the school funding system have helped many school districts. Schools whose buildings were dilapidated and falling apart have been able to raise the funds to build new schools. For example, Fairland High School in Lawrence County is brand new today because the school was able to use over $30 million in state funds[31] to build a school with great facilities and resources. To the extent that the states' redirected and/or increased funds have reached certain disadvantaged school districts like Fairland, those funds have been infinitely helpful. But this temporary stream of funding does not address the serious systemic problem that has been repeatedly

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[31] *See* The Ohio School Facilities Commission, Program Amounts by School District, Fairland Local School District (visited Sept. 11, 2003) <http://www.osfc.state.oh.us/programtotals99.ASP?%5BEnterIRN%5D=47936#> for state and local Classroom Facilities Assistance Money used by Fairland Local School District.

condemned by the Ohio Supreme Court. Without a holistic, systemic approach to school funding reform, schools without a strong property tax base will be facing the same inadequate and inequitable funding problems in 20 years. The only way to avoid that scenario, and avoid another series of long and costly cases like *DeRolph*, is for this Court to require Ohio to comply with the Ohio Supreme Court's mandate.

Accordingly, this Court should grant this petition for writ of certiorari to enforce the Due Process rights of the most vulnerable citizens of Ohio, our children.

II. The Ohio Supreme Court's elimination of plaintiffs' remedy cannot stand in light of our Nation's established state/federal system of justice and the far reaching consequences it may have on the many other states involved in similar litigation.

This Court, while deferential, has not hesitated to exercise jurisdiction in even the most heated and weighty of political issues when faced with a question of the constitutionality of an action by a state court. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam); *See NAACP v. Ala. ex rel. Patterson,* 357 U.S. 449 (1958); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Madsen v. Women's Health Center*, 512 U.S. 753 (1994); *Mitchum v. Foster*, 407 U.S. 225 (1972). *See also*, *Colo. v. Evans*, 517 U.S. 620 (1995).

If the Supreme Court chooses not to hear this case, it will be a signal to other states that judicial pronouncements do not have to be enforced. This is especially true in light of the many states which are involved in litigation similar to *DeRolph*. It will signal to those states whose constitutions require a thorough and efficient system, or something

comparable, that the state legislature does not have to comply or that the state's highest courts can arbitrarily espouse constitutional rights without worry of what means will enforce those rights.

Every state constitution has some provision regarding education, several of which are similar to the Ohio Constitution's provision. The terms most often found in state constitutions include "general and uniform," "thorough and efficient," or some combination or variation of the two.[32] Other significant language includes calling for an "adequate" system of public schools,[33] a system of "high quality" schools,[34] and a system of "free, quality" public schools.[35] All of these terms are open to some interpretation. As a state's highest judicial authority, it is the job of the state Supreme Court to determine the meaning of each state's constitution. If the Ohio General Assembly is permitted to ignore the ruling of the Ohio Supreme Court and no further action is taken or enforced, other state assemblies will take notice. They will know that, even if the school funding system that they put in place does not allow state educational facilities to meet the requirements of each state constitution, there will be no body to enforce the state's constitution. For hundreds of years, the legislative bodies in this nation have

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[32] The states whose Constitutions require either "general and uniform" and/or "thorough and efficient" include Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Texas, Utah, Washington, West Virginia and Wyoming. 65 Temp. L. Rev. 1325, 1347.

[33] Georgia Const., art. VIII, , § 1.

[34] Illinois Const., art. X, , § 1; Virginia Const., art. VIII, , § 1.

[35] Montana Const., art. X, § 1 (3).

respected the decisions on the constitutionality of laws and have acted accordingly.[36]

The legislature's failure to comply with Ohio's constitutional mandate is inexcusable. While time was at first a consideration, nearly a decade has passed since the school funding system was first held unconstitutional by the trial court. Yet the system remains largely unchanged. Ohio still relies primarily on property taxes to fund its schools, a practice that was explicitly denounced in every *DeRolph* decision.[37] Time is no longer an excuse for the state of Ohio to refuse to create a constitutional school funding system.

Furthermore, the current economic climate does not excuse the General Assembly from making systemic alterations to the school funding system. While the current economic downturn may make it difficult for the State to pursue other methods of funding, the State did not act in favorable economic times. This system should not be tolerated on the premise that the state will come up with something better when the economy recovers. Budgetary concerns aside, the state cannot continue to operate under laws that are unconstitutional simply because the public

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[36] "We have 200-plus years of history on our side that when a court says things are unconstitutional, the legislature accepts that and puts together a good-faith effort to deal with the (ruling) of the high court, whether it's state or federal." Ohio Supreme Court Justice Paul Pfeifer, as quoted in the *Columbus Dispatch*. Darrell Rowland. "Ohio's School Funding Crisis: What Now?" *Columbus Dispatch*, December 12, 2002, 01A.

[37] *DeRolph I* at 213, 677 N.E. 2d at 744; *DeRolph II* at 37, 728 N.E.2d at 1020; *DeRolph III* at 322, 754 N.E.2d at 1198; *DeRolph IV* at 436, 780 N.E.2d at 530.

coffers are not overflowing.[38] If we tolerate financial hardship as an excuse for leaving unconstitutional programs in place, what will be next? Should we put a tax on voting? Sell the right to free speech? Should we feed state prisoners one meal a day instead of three? Here it may seem easy to look the other way because the victims of this political inaction are children whose political voices are soft. If this violated some other right under the U.S. or Ohio Constitution -- if, for instance, it were a law saying that indigent accused criminals no longer had a right to an attorney -- one can be certain the outcry would be great. Why is the outcry not just as great when it is the education of our children that is imperiled? The right to a thorough and effective system of government granted in the Ohio Constitution bears just as much significance as other constitutional rights. The State can no more fail to provide a constitutional system of education than it can suspend criminal due process or refuse to feed prisoners.

As petitioners rightfully state in their brief, segregation would still exist today if no judicial remedy was provided in *Brown*. (Pet. 27) It is antithetical to the ideals and principles of our society to recognize a constitutional right, but to deny a remedy to secure that right. By refusing to allow the trial judge to enforce its own ruling, the Ohio Supreme Court has gravely undermined the system by taking away the built-in check on the legislature.

When the Ohio Supreme Court rendered its first *DeRolph* opinion, it concluded with the following remarks:

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[38] *See DeRolph v. State*, 97 Ohio St.3d 434, 436, 780 N.E. 2d 529, 530 (2002). ("We are not unmindful of the difficulties facing the state, but those difficulties do not trump the constitution.")

> School funding has been, and continues to be, a Herculean task. As thirty-seven lawmakers concede in their *amicus curiae* brief, despite their recent efforts, the General Assembly has not funded our public schools properly. They assert that unless this court rules in favor of the appellants, the urgency of resolving public school funding will quickly fade. We find that this brief eloquently expresses the helplessness felt even by many of our state legislators.

DeRolph I at 211-212, 677 N.E.2d at 746.

It is with the same earnestness that these thirty-seven lawmakers came to the Ohio Supreme Court eight years ago that we come to the U.S. Supreme Court today. Disallowing Judge Lewis to enforce the higher court's ruling will only lead to the erosion of both our judicial system and our education system. We cannot turn our backs on the problem at hand; we must allow the judicial system to guide our actions that protect all children, regardless of where they live or the wealth of their community.

Accordingly, this Court should grant the petition for writ of certiorari to ensure that school children in Ohio, and throughout the nation, are guaranteed that legally enforceable rights will not be hollow, but will be accompanied by legally enforceable remedies. This is the essence of the Rule of Law.

CONCLUSION

For all the aforementioned reasons, as well as the reasons articulated by petitioner, certiorari should be granted.

Respectfully Submitted,

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No. 03-245

IN THE
Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO
Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF AMICI CURIAE SOUTH CAROLINA SCHOOL DISTRICTS, TAXPAYERS, AND CHILDREN IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI[1]

Amici are South Carolina school districts, taxpayers, and children currently bringing suit against the State of South Carolina, the Governor of South Carolina, and representatives of the South Carolina Senate and House of Representatives [hereinafter collectively referred to as "South Carolina Defendants"] for failing to provide the opportunity for each child to receive a minimally adequate education, as required by the South Carolina Constitution.[2]

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[1] The Amici file this brief with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the Amici, their members, or their counsel, made a monetary contribution for the preparation or submission of this brief.

[2] The South Carolina case, Abbeville County School District, Allendale County School District, Bamberg County School District 1, Bamberg County School District 2, Barnwell County School District 19, Barnwell County School District 29, Barnwell County School District 45, Berkeley County School District, Chesterfield County School District, Clarendon County School District 1, Clarendon County School District 2, Clarendon County School District 3, Dillon County School District 1, Dillon County School District 2, Dillon County School District 3, Florence County School District 1, Florence County School District 2, Florence County School District 3, Florence County School District 4, Florence County School District 5, Hampton County School District 1, Hampton County School District 2, Jasper County School District, Laurens County School District 55, Laurens County School District 56, Lee County School District, Lexington County School District 4, Marion County School District 1, Marion County School District 2, Marion County School District 7, Marlboro County School District, McCormick County School District, Orangeburg Consolidated School District 3, Orangeburg Consolidated School District 5, Saluda County School District and Williamsburg County School District; Lena Manning, individually, and as a taxpayer residing in Allendale County and as Guardian ad Litem of Courtney Vincent; Courtney Vincent, a minor, by and through Lena Manning, as Guardian ad Litem; William L. Mills, individually, and as a taxpayer residing in Allendale County and as Guardian ad Litem of Waylon Priester; Waylon Priester, a minor, by and through William Mills, as Guardian ad Litem; Betty Bagley, individually, and as a taxpayer residing in Bamberg County and as a parent and Guardian ad Litem of Tyler Bagley; Tyler Bagley, a minor, by and

through Betty Bagley, as Guardian ad Litem; Evert Comer, Jr., individually, and as a taxpayer residing in Bamberg County and as parent and Guardian ad Litem of Kimberly Comer; Kimberly Comer, a minor, by and through Evert Comer, Jr., as Guardian ad Litem; Marla Q. Jameson, individually, and as a taxpayer residing in Barnwell County and as a parent and Guardian ad Litem of Eleanor Jameson; Eleanor Jameson, a minor, by and through Marla Q. Jameson, as Guardian ad Litem; Victor M. Lancaster, Sr., ndividually, and as a taxpayer residing in Barnwell County and as parent and Guardian ad Litem of Christie Lancaster; Christie Lancaster, a minor, by and through Victor M. Lancaster, Sr., as Guardian ad Litem; Dr. Charles Clark, individually, and as a taxpayer residing in Chesterfield County and as parent and Guardian ad Litem of Candace Clark; Candace Clark, a minor, by and through Dr. Charles Clark, as Guardian ad Litem; Colonel Larry Coker, individually, and as a taxpayer residing in Clarendon County and as parent and Guardian ad Litem of Corrie Coke; Corrie Coker, a minor, by and through Colonel Larry Coker, as Guardian ad Litem; Pamela Williams, individually, and as a taxpayer residing in Dillon County, and as parent and Guardian ad Litem of Katisha Williams; Katisha Williams, a minor, by and through Pamela Williams as Guardian ad Litem; Eddie Wright, individually, and as a taxpayer residing in Florence County, and as parent and Guardian ad Litem of Brandon Fullard; Brandon Fullard, a minor, by and through Eddie Wright as Guardian ad Litem; John Whiteside, individually, and as a taxpayer residing in Florence County and as parent and Guardian ad Litem of Joel Whiteside, Joel Whiteside, a minor, by and through John Whiteside, as Guardian ad Litem; Dr. Francis Mills, individually, and as a taxpayer residing in Hampton county and as parent and Guardian ad Litem of Amy Mills; Amy Mills, a minor, by and through Dr. Francis Mills, as Guardian ad Litem; Brenda Brooks, individually, and as a taxpayer residing in Hampton County, and as parent and Guardian ad Litem of Tyrin Brooks; Tyrin Brooks, a minor, by and through Brenda Brooks as Guardian ad Litem; Marva Tigner, individually, and as a taxpayer residing in Jasper County, and as parent and Guardian ad Litem of Bryan Tigner and Bradley Tigner; Bryan Tigner, a minor, by and through Marva Tigner as Guardian ad Litem; Bradley Tigner, a minor, by and through Marva Tigner as Guardian ad Litem; Robert Elisha Short, individually, and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Robert B. Short; Robert B. Short, a minor, by and through Robert Elisha Short, as Guardian ad Litem; Dr. Keith A. Bridges, individually and as a taxpayer residing in Laurens County and as parent and Guardian ad Litem of Jorgana Ranson Bridges; Jorgana Ranson Bridges, a minor, by and through Dr. Keith A. Bridges, as Guardian ad Litem; Gail Y. Harriott, individually, and as a taxpayer

Similar to the Petitioners in the case before this Court, Dale R. DeRolph, et al. v. The State ex rel. State of Ohio, the South Carolina school districts have fought for approximately a decade to provide their children with the opportunity to break free from poverty and ignorance by allocating adequate funding to education. The South Carolina school districts are presently in trial, where they are

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residing in Lee County and as parent and Guardian ad Litem of Rashade Harriott; Rashade Harriott, a minor, by and through Gail Y. Harriott, as Guardian ad Litem; Linda Carraway, individually, and as a taxpayer residing in Marion County, and as parent and Guardian ad Litem of Kimberly Wise; Kimberly Wise, a minor, by and through Linda Carraway as Guardian ad Litem; Dr. John Nobles, individually, and as a taxpayer residing in Marlboro County and as parent and Guardian ad Litem of Erin Nobles; Erin Nobles, a minor, by and through Dr. John Nobles, as Guardian ad Litem; Patricia Hampton, individually, and as a taxpayer residing in McCormick County and as parent and Guardian ad Litem of Krystle Hampton; Krystle Hampton, a minor, by and through Patricia Hampton, as Guardian ad Litem; Bernice Profit, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Russell Hezekiah; Russell Hezekiah, a minor, by and through Bernice Profit, as Guardian ad Litem; Matlin P. Brown, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Tanisha P. Brown; Tanisha P. Brown, a minor, by and through Matlin P. Brown, as Guardian ad Litem; James Berry, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Dondrea Berry; Dondrea Berry, a minor, by and through James Berry, as Guardian ad Litem; Gerald Smith, individually, and as a taxpayer residing in Orangeburg County and as parent and Guardian ad Litem of Brenda Smith; Brenda Smith, a minor, by and through Gerald Smith, as Guardian ad Litem; Thomas Shealy, individually, and as a taxpayer residing in Saluda County and as parent and Guardian ad Litem of Thomas Shealy, Jr.; Thomas Shealy, Jr., a minor, by and through Thomas Shealy, as Guardian ad Litem, vs. The State of South Carolina; Mark C. Sanford, as Governor of the State of South Carolina; Warren K. Giese, as Chairman of the Senate Education Committee and Chairman of the Senate Finance Committee, in his representative capacity as a properly designated representative of the South Carolina Senate; David H. Wilkins, as Speaker of the House of Representatives and as a representative of the South Carolina House of Representatives, Civil Action 93-CP-31-169, is pending in the Court of Common Pleas for Lee County, South Carolina.

presenting evidence of budget cuts to the schools despite overcrowding, poorly maintained buildings, under qualified teachers, and inadequate teaching materials. Without guidance from this Court, the children in poor and rural school districts in South Carolina may never have the chance to break free from the current cycle of ignorance, poverty, and despair.

In submitting this brief, Amici wish to call attention to law and arguments that may assist the Court and to call attention to the broad implications of the issues raised by the petition for writ of certiorari submitted by the DeRolph Petitioners. At stake is the distinct likelihood that litigants and school children in other states involved in similar litigation may also have remedies foreclosed to them, as seen in Ohio, in violation of the Due Process and Equal Protection Clauses of the United States Constitution.

The State of South Carolina has consistently neglected to fulfill its state constitutional obligations to local school districts by forcing them to find necessary funding to accomplish the State's educational obligations. The local revenue generated for education is primarily derived from local property taxes so that those districts with greater property values naturally enjoy greater revenue. The school districts comprising the Amici are poor, rural districts that have a disproportionate number of pupils living in poverty. These disadvantaged pupils have consistently performed below the educational level expected and required by the State of South Carolina.

Furthermore, these school districts do not have the fiscal capacities to fund the necessary educational programs and mandates to meet the needs of these disadvantaged students, and the State does not sufficiently take poverty or other educational disadvantages into consideration when allocating education funds among all the districts. State

funding for education in South Carolina is accomplished primarily through mechanisms under the Education Finance Act (EFA), S.C. Code §§ 59-20-10 to 80 (Law. Co-op. 1990 & Supp. 1998), and the Education Improvement Act (EIA), S.C. Code §§ 59-21-420 to 450 (Law. Co-op. 1990 & Supp. 1998). The EFA provides the foundation for funding and utilizes a weighting system intended to distribute funding equitably among the eighty-five school districts in South Carolina based on the individual district's local property tax base. South Carolina has failed to fully fund its part of this program 21 times in the past 29 years. As such, these school districts must increasingly rely on meager local and federal funds to meet the most basic educational needs.

Amici initially brought a declaratory judgment action in November 1993 challenging the State of South Carolina's funding of public primary and secondary education and seeking to reform education finance in South Carolina to achieve a more effective means of providing its pupils with the opportunity for a level of education guaranteed by the South Carolina Constitution. Amici alleged violations of the South Carolina Constitution's education clause (art. XI, § 3),[3] the state and federal equal protection clauses, and a violation of the EFA.

South Carolina Defendants moved to dismiss on the grounds that the Complaint failed to state a cause of action, and the trial court granted that motion in 1995. Amici appealed that ruling to the South Carolina Supreme Court. In 1999, the South Carolina Supreme Court issued an opinion reversing the trial court's ruling regarding the South

[3] This section of the South Carolina Constitution is entitled "System of free public schools and other public institutions" and provides: "The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable." S.C. Const. art. XI, § 3.

Carolina Constitution's education clause and affirming the remainder of the trial court's ruling. See Abbeville County School District v. South Carolina, 515 S.E.2d 535 (S.C. 1999). The South Carolina Supreme Court stated:

> We hold today that the South Carolina Constitution's education clause requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education. . . . We define this minimally adequate education required by our Constitution to include providing students adequate and safe facilities in which they have the opportunity to acquire: (1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; (2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and (3) academic and vocational skills. . . . [W]e have defined, within deliberately broad parameters, the outlines of the constitution's requirement of minimally adequate education.

Id. at 540-41.

The state supreme court remanded for further proceedings, and a bench trial is currently ongoing. In that trial, Amici seek a declaratory judgment that the State of South Carolina has failed and is continuing to fail to provide students in the plaintiff school districts with an opportunity to receive a minimally adequate education, as defined in the Abbeville County decision. Specifically, Amici are requesting that the trial court provide guidance to the South Carolina Legislature by requiring a baseline system of investigation and accountability that is necessary to remedy

the present failure to comply with the constitutional standard. In particular, the plaintiff school districts are requesting that the State of South Carolina should be required to: (1) conduct a "costing out" study to determine the actual cost of providing a minimally adequate education; (2) utilize the results of the costing out study to ensure that each school in the plaintiff school districts has adequate resources to provide the opportunity for a minimally adequate education to each child; and (3) establish a system of accountability to measure whether the reforms devised by the legislature actually provide and maintain the opportunity to obtain a minimally adequate education in the plaintiff school districts. Additionally, the Amici are asking the trial court to set a timetable for compliance with the constitutional mandate and reserve jurisdiction to take further action if the remedies imposed are not effected by that date.

The South Carolina Defendants have filed a motion to dismiss the requested remedies on the grounds that the court does not have the authority to do more than declare the constitutionality of the state education statute.[4] In other words, the South Carolina Defendants are seeking to restrict the court's role to merely declaring a right, thereby prohibiting the court from providing any remedy for the violation of that right.

Accordingly, the case before this Court can have a direct effect on the children of South Carolina in the Abbeville County case because the South Carolina trial judge is currently considering a similar issue with very little guidance in the way of precedent in this state. This issue is novel to South Carolina, and other courts across the country are split in their decisions. Without direct guidance from this Court, the immediate losers are the children of South Carolina, who may well be forced to a lifetime of poverty

[4] This motion is currently pending before the trial court.

and ignorance as the South Carolina school districts continue to wage their ten-year legal battle for educational funding and the case languishes in the courts.

SUMMARY OF ARGUMENT

Due Process requires that state courts protect state constitutional rights by remedying them. The failure to do so violates litigants' federal constitutional rights. Certiorari should be granted in this case to ensure that the scope of judicial power, when faced with remedying a state constitutional violation, is not so eroded.

ARGUMENT

State courts across the United States, facing state constitutional challenges to their respective public school funding systems, continue to grapple with the extent to which they may remedy such state constitutional violations. In so doing, these courts are forced to balance their duty to uphold and enforce the state constitution with the restraint required not to impede upon the province of the legislative branch. However, when the balance tips too far in favor of restraint and, as a result, affirmative state constitutional rights -- such as the right to an adequate education -- go unfulfilled and unenforced, due process and equal protection violations can and do occur.

Such is the case in DeRolph, in which the Petitioners have been left without any remedy for a state constitutional violation despite the Ohio Supreme Court's own rulings that Ohio's current educational system is unconstitutional. The Petitioners' predicament raises concerns that a trial court ruling in favor of the Amici in their own trial could ultimately be hollow.

Due process requires that rights guaranteed by state constitutions be enforced, particularly when those constitutions create an affirmative duty upon the state, such as providing an adequate education. When such rights are denied, the courts must provide a remedy. As the Washington Supreme Court in the education funding case of Seattle Sch. Dist. No. 1 v. Washington aptly stated: "Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail mandatory provisions by its silence. The judicial obligation to protect constitutionally declared fundamental rights of individuals is as old as the United States." 585 P.2d 71, 87 n. 7 (Wash. 1978) (citing Marbury v. Madison, 5 U.S (1 Cranch) 137, 163 (1893)). The Ohio Supreme Court has failed its judicial obligation by holding Ohio's educational system unconstitutional, setting forth remedies, and then eviscerating those remedies by denying access to its courts to enforce those remedies in the face of the state's continued failure to meet its affirmative, state constitutional duties.

When a question was raised about judicial authority to mandate the reform of state electoral systems, this Court, in Reynolds v. Sims, 377 U.S. 533 (1964), stated:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. **Our answer is this: a denial of constitutionally protected rights demands judicial**

protection; our oath and our office require no less of us.

Id. at 566 (emphasis added). No less is required of state courts when called upon to remedy the denial of judicially recognized rights protected and guaranteed by their respective state constitutions. The failure to meet that obligation and provide access to the courts to enforce such rights violates the Due Process and Equal Protection Clauses of the United States Constitution. This Court should grant the petition for writ of certiorari submitted by the plaintiffs in DeRolph to ensure that these principles are upheld in Ohio, as well as the rest of the United States.

This Court has previously found certiorari to be warranted in a comparable scenario. After this Court decided Brown v. Board of Education, 349 U.S. 294 (1955) ("Brown II"), courts across the country were mandated to implement a remedy to a constitutional violation in the face of local authorities' failure to desegregate schools. This Court then granted certiorari in numerous cases to clarify the scope of judicial power when faced with the directive of curing a constitutional violation. See, e.g., Swann v. Mecklenburg, 402 U.S. 1 (1971). A circumstance analogous to that following this Court's decision in Brown II is currently unfolding nationally with respect to state constitutional rights, and the instant petition exemplifies that circumstance.

The Ohio legislature has, as have many legislatures across the country, demonstrated an unwillingness to remedy the clearly outlined state constitutional violation of failing to provide an adequate education. The Ohio Supreme Court, in contravention of its own rulings, has enabled such inaction on the part of the legislature. If that decision is allowed to stand, such circumstances risk repeating in South Carolina and throughout the country resulting in the denial of the

guaranteed right of an adequate education. Amici, in their South Carolina action, seek similar remedies as those obtained by Petitioners and fear, if successful in establishing the unconstitutionality of South Carolina's educational system, the same fate of having such remedies foreclosed from them in violation of due process and equal protection.

The unsuccessful implementation of remedies following Brown II compelled this Court in Mecklenberg to grant certiorari because:

> The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts. The failure of local authorities to meet their constitutional obligations aggravated the massive problem of converting from the state-enforced discrimination of racially separate schools.

402 U.S. at 14. Significantly, this Court found that "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." Id. at 15-16. The Court then established comprehensive, issue-specific guidelines and mandates, explicitly instructing district courts to retain jurisdiction when necessary "to assure that these responsibilities are carried out." Id. at 21.

Such assurances are now required with respect to education funding cases across the country to ensure that federally protected due process and equal protection rights are not trampled upon. Courts should not be permitted to

avoid their judicial obligations in the face of state constitutional violations by either providing no remedy or, as is the case in Ohio, denying access for enforcement of that remedy. When states fail to fulfill their affirmative duty of providing an adequate education and courts allow that failure to perpetuate, children are stranded in education systems that fail to provide the minimal level of education guaranteed to them by their state's constitutions. The damage from such circumstances is irreparable and continuing.

Ohio's children have been deprived of a guaranteed, state constitutional right as well as the means to remedy that deprivation, and therefore federal due process and equal protection are squarely implicated. The issues raised by the present petition for writ of certiorari require this Court's intervention to preserve federal due process and equal protection rights in the same manner that such intervention was demanded by this country's efforts to desegregate its schools. Amici request that this Court grant the petition for writ of certiorari to protect the due process and equal protection rights of all litigants facing the likelihood of courts foreclosing remedies despite declared, state constitutional violations as was done in Ohio.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court accept this brief and grant the petition for writ of certiorari.

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IN THE
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DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Ohio

BRIEF AMICUS CURIAE FOR THE COUNCIL OF THE GREAT CITY SCHOOLS IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 03-245

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to The Supreme Court of Ohio

BRIEF AMICUS CURIAE FOR THE COUNCIL OF THE GREAT CITY SCHOOLS IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The Council of the Great City Schools ("Council") is the only national organization representing the needs of America's urban public schools. The Council is a coalition

[1] Counsel of record authored the brief in its entirety. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief. Petitioners and Respondent have consented to the filing of this brief.

of 60 of the nation's largest urban public school systems, incorporated in 1961 for the purpose of improving the quality of urban education through research, legislation, technical assistance and advocacy. The school districts of Cleveland, Columbus, Dayton and Toledo comprise the Council's membership in Ohio. Other large school district Council members include Chicago, Los Angeles, Detroit, Miami-Dade, and Houston.

To assist its members and the larger education community in understanding issues and best practices in urban education today, the Council collects data on public education and publishes regular reports. The topics of recent Council reports have ranged from the progress of urban school districts in closing achievement gaps to efforts to recruit highly qualified teachers.

The Council has a strong interest in supporting efforts to adequately fund the education of millions of children enrolled in America's urban public schools. Toward that end, the Council has prepared major studies of school finance in four of its member districts, including an analysis for the Dayton Public Schools on how to improve student achievement and how to pay for the needed reforms.

The Petition for Writ of Certiorari sets forth the reasons why the Supreme Court of Ohio denied the Due Process of law protected by the Fourteenth Amendment to the Constitution when it foreclosed the successful plaintiffs in the Ohio school finance litigation from any remedy for the violations of the Ohio Constitution that the Supreme Court of Ohio had itself confirmed. The Council wishes to bring to the Court's attention facts concerning the importance of this case in a national perspective.

On one level, it may seem surprising that the Council is troubled by the Ohio decision and supports this Court's

review and reversal of the Supreme Court of Ohio's writ of prohibition. Council member districts no doubt are more often defendants than plaintiffs in state court litigation. That does not deter the Council from speaking out about the importance of the Supreme Court of Ohio's actions, however, because the rule of law is vital to the ability of governmental bodies, like the Council members, to predict their obligations and conform to what is expected. Public school children throughout the Nation are taught that the courts are available for the redress of grievances, that court orders and judgments must be obeyed, and that court orders will be enforced if necessary to exact compliance of a recalcitrant defendant. The Supreme Court of Ohio's writ of prohibition undermines that vital lesson.

SUMMARY OF THE ARGUMENT

The issue presented by the Petitioners is important not only for public school students in Ohio, but throughout the Nation. Significant school finance litigation brought under State constitutions is pending in many other states. The Due Process issue presented also is not limited to school finance cases. The troublesome appearance that the Supreme Court of Ohio reversed course because of a change in its composition adds to the importance of this case.

ARGUMENT

The Petition Raises an Issue of National Importance Because Other Courts, Like the Supreme Court of Ohio, Could Deprive Litigants in School Finance Cases of Effective Remedies

Since this Court's decision in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), holding that education is not a fundamental right for purposes of Equal Protection analysis under the Fourteenth Amendment,

schoolchildren and others vitally interested in fair and sufficient educational opportunity have looked to state law and state constitutions as a source of legal protection against inequity and inadequacy in the quality of public education. Lawsuits challenging state methods of funding public schools have been brought in 45 of the 50 states.[2] Since 1989, plaintiffs have prevailed in about two-thirds of the cases that have reached a final decision in the highest court of a state. The enforcement of judgments in favor of plaintiffs in these cases accordingly is a matter of national importance that extends well beyond the vital interests of the schoolchildren of Ohio. School finance cases are pending, or have reached the post-judgment remedy stage, in such large states as New York,[3] California,[4] North Carolina,[5] and Massachusetts.[6]

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2 The Advocacy Center for Children's Educational Success with Standards (ACCESS), *Litigation, Finance Litigation, Overview* (Sept. 12, 2003), *at* http://www.accessednetwork.org.

3 *Campaign for Fiscal Equity, Inc. v. New York,* — N.E.2d —, No. 1/74, 2003 WL 21468502 (N.Y. June 26, 2003) (ruling for plaintiffs).

4 *Williams v. California,* No. 312236 (Super. Ct. Cal. San Francisco County) (pending).

5 *Hoke County Bd. of Educ. v. North Carolina*, No. 95 CVS 1158 (N.C. Super. Ct.) (unpublished opinions issued Oct. 12, 2000, Oct. 26, 2000, Mar. 26, 2001, and Apr. 4, 2002), *discretionary review granted*, No. 530PA02 (N.C. Mar. 18, 2003) (oral argument heard Sept. 10, 2003).

6 *Hancock v. Comm'r of Educ.*, Civil Action No. 2002-2978 (Mass. Super. Ct., Suffolk County) (trial ongoing to determine whether the State of Massachusetts has satisfied its obligations to provide a constitutionally adequate education, as defined by the Massachusetts Supreme Judicial Court in *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993)).

The Due Process issue raised here – whether a state high court can deprive plaintiffs holding a valid judgment of any remedy – is not limited to school finance litigation. This situation can arise in any setting in which defendants are recalcitrant,[7] litigation is ongoing, and public controversy develops.

The Petition describes a "change . . . in the composition of the Supreme Court of Ohio" as the only change in the circumstances in the *DeRolph* case between *DeRolph v. State*, 97 Ohio St. 3d 434, 780 N.E.2d 529 (2002) ("*DeRolph IV*") on December 11, 2002, and the entry of the writ of prohibition on May 16, 2003. Pet. 12 n.8. The troublesome appearance that the Supreme Court of Ohio reversed course because of a change in its composition adds to the importance of this case. Petitioners cogently argue that the Due Process Clause defines boundaries on the ability of a state court simply to dispense with any remedy for an adjudicated violation of law. Pet. 16 – 23. An independent and impartial tribunal that bases decision on the facts and the law is the vital underpinning of notions of Due Process in litigation. *In re Murchison*, 349 U.S. 133, 136 (1955). Just two Terms ago, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Court addressed the difficult tensions between the First Amendment protections of judicial candidates and the Due Process rights of litigants to fair and unbiased tribunals. *Republican Party* presented a question focused on the state judicial election process. The Petition here seeks the Court's guidance on an equally difficult and important issue on the other end of the process: What are the

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[7] The decision that Petitioners ask this Court to review describes over five years of effort by the Ohio Courts to have the legislature implement its mandate that public schools in Ohio be funded and maintained in full compliance with the Ohio Constitution. *See* Pet. App. 2a-6a.

boundaries of Due Process in cases of great public importance in which state court judges, without articulating a change in the facts or the law that would support a shift in the result, simply halt further proceedings after declaring that the plaintiffs are entitled to a remedy?

Although the circumstances in this case may seem extreme and unlikely to be repeated, the Council urges the Court to consider that this case is far from unique. Indeed, if this Court declines to review the actions of the Supreme Court of Ohio in this case, the Council is concerned that they will become the basis for a new set of litigation tactics that will deprive plaintiffs elsewhere of remedies to which they are entitled, including public school children throughout the Nation.

CONCLUSION

For all of these reasons, the Council of the Great City Schools urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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THE STATE EX. REL. STATE OF OHIO,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF AMICI CURIAE
Various Members of the Ohio General Assembly Minority Caucuses in Support of Petitioners

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INTEREST OF *AMICI CURIAE*

The appearance as *amici curiae* is made by forty duly elected and acting members of the current Ohio General Assembly.[1] The *amici curiae* include State Representatives Dixie J. Allen, Catherine L. Barrett, Joyce Beatty, John Boccieri, Thomas T. Book, Edna Brown, Kenneth A. Carano, Kathleen Chandler, Mary M. Cirelli, Michael DeBose, L. George Distel, John Domenick, Steven L. Driehaus, William J. Hartnett, Sandra Stabile Harwood, Annie L. Key, Dale Miller, Jeanine Perry, Larry Price, Chris Redfern, Daniel J. Sferra, Michael Skindell, Dan Stewart, Fred Strahorn, Barbara Ann Sykes, Peter Ujvagi, Charlie Wilson, Jr., Claudette Woodard, Tyrone K. Yates, and State Senators DanielR. Brady, Marc Dann, Greg L. DiDonato, Teresa Fedor, Eric D. Fingerhut, Robert F. Hagan, Leigh E. Herington, Mark L. Mallory, Ray Miller, C.J. Prentiss and Thomas M.Roberts .

These legislators represent over four million Ohioans and their districts include rural, suburban, and large urban city school systems. These legislators have been actively involved in seeking a constitutional method of funding Ohio's public schools and many have filed *amici curiae* briefs with the Ohio Supreme Courtin prior school funding litigation.

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[1] Counsel for the *amici*, in consultation with *amici* and their staff, authored the brief in whole. No person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk.

The *amici curiae* enter this appearance for the purpose of providing the Court with certain Ohio-specific information which may not be readily available to the parties or other *amici* and to provide a unique legislative perspective on this matter of national importance.

SUMMARY OF ARGUMENT

In its *DeRolph* decisions, the Ohio Supreme Court clearly and repeatedly declared Ohio's system of funding public education unconstitutional. However, this same court subsequently granted the State's request for a writ of prohibition against the trial court from conducting a compliance conference regarding the enforcement of the Ohio Supreme Court's remedial decrees. *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97 (2003) (*"Lewis"*).[2]

The Ohio Supreme Court's ruling in *Lewis* effectively denies any form of relief to the Petitioners. The court's decision in *Lewis* has a pervasive, resounding effect not only on the quality of education in Ohio, but also on the fundamental democratic ability of citizens to challenge state action.

Ongoing judicial supervision is both necessary and appropriate, especially in light of the precedents set by school desegregation cases. *See Freeman v. Pitts*, 503 U.S. 457 (1992) and *Swann v. Charlotte-Mechklenburg Bd. of Educ.*, 402 U.S. 1 (1971). These cases establish that a limited need for judicial supervision exists when the rule-

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[2] "[B]ecause it is beyond doubt that Judge Lewis and the common pleas court patently and unambiguously lack jurisdiction over any post-*DeRolph IV* proceedings, we now grant a peremptory writ and end any further *DeRolph* litigation in *DeRolph v. State*." *Lewis* at 104.

making body fails to exercise good faith. Furthermore, judicial supervision does not raise concerns about usurping policy-making decisions from the sovereign people of Ohio. Rather, judicial action would restore the dignity of the Ohio Supreme Court's remedial decrees as having legal effect.

The Governor's Blue Ribbon Task Force on Financing Student Success should not serve as evidence of state action dismissing the need for judicial supervision. Seven previous commissions and committees were established with the same purpose of overhauling the state school-funding scheme. Many of these groups failed to generate any proposed changes; those that did were ultimately ignored by the legislature. In fact, the State proceeded to alter future public educational funding, acting in a manner counterproductive to the mandated goal of increasing the overall quality of public schools. *See* Sub. H.B. 95, 125th Gen. Assem., Reg. Sess. (Oh. 2003). Furthermore, the Governor affirmatively stated his belief that Ohio already has in place a constitutional system of funding schools. *See "Statement by [Ohio] Governor Bob Taft,"* Dec. 11, 2002, *available at* http://www.state.oh.us/gov/releases/Archive2002/121102derolph.htm (last visited Sept. 12, 2003).

The prohibition against enforcement of the remedial decrees allows a fundamentally unconstitutional educational system to continue to operate. This Court must allow judicial intervention by the trial court to restore ordered liberty and uphold respect for the rule of law.

ARGUMENT

I. The Petition Should Be Granted to Preserve Respect for the Rule of Law.

In four separate decisions, the Ohio Supreme Court determined that Ohio's system of funding public schools was unconstitutional. *DeRolph v. State* 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) *("DeRolph I")*; *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) *("DeRolph II")*; *DeRolph v. State,* 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) *("DeRolph III")*; *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002) *("DeRolph IV")*.

After the first three decisions, the legislative and executive branches made limited attempts to address the Ohio Supreme Court's concerns, each time failing to meet the Ohio Constitutional requirement of securing a "thorough and efficient system of common schools throughout the state ...." Ohio Const., art. VI, § 2.

In the absence of any legislative activity by the State to comply with *DeRolph IV*, the Petitioners filed a motion with the trial court for a compliance conference. The State responded by filing an original action in the Ohio Supreme Court requesting a writ of prohibition to bar the trial court from entertaining Petitioners' motion and the Ohio Supreme Court subsequently entered a judgment granting the State's request. *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97 (2003)("*Lewis*").

After *DeRolph IV* and the *Lewis* decision, the State actually backtracked from a system already found to be unconstitutional. If access to the courts is denied to

enforce four Ohio Supreme Court remedial decrees, many other states in similar situations will experience Ohio's dilemma --- a favorable decision with no enforceable remedy. There would remain little to no incentive for any plaintiff in any state to challenge state action on constitutional grounds.

A brief overview of past legislative and executive responses (or lack of response) to the Ohio Supreme Court school funding decisions may help illustrate the need for judicial intervention in matters of this significance, particularly when respect for the rule of law is at stake.

Over the last nine years, at least seven commissions and committees have been established to address aspects of Ohio's school funding system.[3] And while certainly several positive steps have been made by the State over the last decade, the following recitation of some of the shortcomings are worth noting given the stark reality of the *Lewis* decision.

In response to the initial trial court decision in *DeRolph*, the State Board of Education and Ohio School Superintendent appointed a commission to respond to the decision. The legislature never implemented the commission's proposal.

In response to the first decision of the Ohio Supreme Court (*DeRolph I*), the "Ohio School Funding Task Force" was appointed. A sixteen member legislative

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[3] For a brief overview of past commissions, see "*A History of Commissions*", an insert included in the article by Catherine Candisky, "*School-funding panel optimistic,*" Cols. Dispatch, Aug. 4, 2003, at C1.

committee was also formed to develop a remedy but the panel never issued a report.

While the legislature did approve several pieces of legislation in response to *DeRolph I*[4], including provisions that increased funding for the school foundation formula and school facility construction, the trial court again ruled the system unconstitutional. Thereafter, the Ohio Supreme Court issued its second *DeRolph* decision, indicating that "[t]he General Assembly must give this problem its undivided attention. If it is not addressed and solved immediately, it will only increase in magnitude." *DeRolph II* at 3. The Court also stated that certain unfunded mandates "must be addressed and immediately funded." *Id.* at 37.

DeRolph II was issued on May 11, 2000. The State did not timely address the Court's mandate. The first piece of legislation enacted to address unfunded mandates occurred after November 2000. Am. Sub. S.B. 345, 123rd Gen. Assem., Reg. Sess. (Oh. 2000).

Two joint legislative committees were convened after the *DeRolph II* decision was rendered. The "Joint Committee on School Funding and Accountability" was formed, held meetings, and never issued a report of any kind. The "Joint Committee to Re-Examine the Cost of an Adequate Education" met for the first time on August 22, 2000, and did not issue a report until December 31, 2000. Legislation representing the State's response to *DeRolph II* was signed by the Governor less than one

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[4] *See* Sub. H.B. 650, 122nd Gen. Assem., Reg. Sess. (Oh. 1998); Am. Sub. S.B. 102, 122nd Gen. Assem., Reg. Sess. (Oh. 1997).

month prior to the Ohio Supreme Court's June 15, 2001, deadline. The Ohio Supreme Court subsequently found this effort unconstitutional in *DeRolph III.*

In response to *DeRolph III*, the State moved for reconsideration, which was granted by the Court pending the outcome of mediation. After mediation failed, the Ohio Supreme Court issued *DeRolph IV*, vacating *DeRolph III* and determining that *DeRolph I* and *II* are the law of the case and again stating that the current school funding system is unconstitutional. The Ohio Supreme Court noted the following:

> To date, the principal legislative response to *DeRolph I* and *DeRolph II* has been to increase funding, which has benefited many schoolchildren. However, the General Assembly has not focused on the core constitutional directive of *DeRolph I*: "a complete systematic overhaul" of the school-funding system. [citations omitted] Today we reiterate that that is what is needed, not further nibbling at the edges. Accordingly, we direct the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.

DeRolph IV at 3.

On the very same day *DeRolph IV* was handed down, the Ohio Governor held a press conference, stating:

> Today the Ohio Supreme Court *ended* the 11-year-old DeRolph school-funding lawsuit. The Court vacated its September 2000 [*sic*] ruling in DeRolph III and relinquished any ongoing oversight of the case. *The DeRolph case is over. ...I continue to believe* with the changes we made pursuant to DeRolph I and II, *Ohio has a constitutional system of funding our schools.*

"Statement by [Ohio] Governor Bob Taft," Dec. 11, 2002, *available at* http://www.state.oh.us/gov/releases/Archive2002/121102derolph.htm (last visited Sept. 12, 2003)(emphasis added).

Several months later, the Governor issued an executive order that cut $99.9 million from the Department of Education, of which $90.6 million was to go directly to school districts for foundation aid and parity aid for fiscal year 2003. Exec. Order 2003-03T [Ohio], Mar. 5, 2003.

In addition, the first state operating budget, which includes funding for education, signed into law after *DeRolph IV* actually backtracked from the system found unconstitutional. The State reduced planned increases in the state foundation formula from 2.8% to 2.2%, delayed full implementation of special education funding weights, and failed to implement a new method of counting poor students that reduced aid to poor school districts by over $75 million per year. Sub. H.B. 95, 125th Gen. Assem., Reg. Sess. (Oh. 2003).

Although first mentioned in the Governor's State of the State address on January 22, 2003, the inaugural meeting of the Governor's Blue Ribbon Task Force on Financing Student Success was held on August 7, 2003. Given Ohio's history, it would be particularly disingenuous for the State to use such a commission as evidence that judicial intervention regarding compliance with *DeRolph* remedial decrees is not warranted.

Furthermore, the Petitioners are not asking that the United States Supreme Court decide a state policy question rather than the people of Ohio. Rather, the issue remains access to the courts for enforcement of the Ohio Supreme Court's remedial decrees.

This Court has rejected the notion that a state or local government may refuse to comply with judicially ordered remedies. The *Lewis* decision calls into question respect for the rule of law both in Ohio and in other states facing similar circumstances. At a time when the judiciary is seemingly under constant attack, the ability for a state government with a history of noncompliance with previous orders to simply ignore remedial decrees and instead wait for an entirely new case to be filed and wind its way through the system, perhaps for another decade as was the case with *DeRolph* and its progeny, offends historical notions of ordered liberty.

The current situation is analogous in many respects to desegration cases, in which the judiciary has recognized a limited need for continued supervision. When school districts did not demonstrate good faith under a comprehensive plan to remedy ongoing violations, "we have without hesitation approved comprehensive and

continued district court supervision." *Freeman v. Pitts*, 503 U.S. 457, 499 (1992); *See also Swann v. Charlotte-Mechklenburg Bd. of Educ.*, 402 U.S. 1 (1971). The State has had four distinct opportunities to comply with the Ohio Supreme Court's remedial decrees and has failed to do so.[5] Furthermore, judicial authority to enforce remedial decrees takes on heightened importance when there are ongoing violations of declared rights. *See Hutto v. Finney*, 437 U.S. 678, 690 (1978).

Petitioners succinctly stated in their *Petition for Writ of Certiorari* the reality of the *Lewis* decision, in that Lewis stands "ordered liberty" on its head, enabling Ohio's legislative and executive branches to continue to knowingly violate the law while affirmatively prohibiting Ohio's courts from enforcing compliance with the law.

Such a situation only encourages active disregard for the rule of law. It will indeed be a blow to judicial integrity if the *Lewis* decision is allowed to stand.

CONCLUSION

For all of the foregoing reasons, the *amici* respectfully urge the Court to grant the *Petition for Writ of Certiorari.*

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[5] One glaring example of the State's intransigence is the lack of a serious effort to address an over-reliance on property taxes within the school funding system, an issue the Ohio Supreme Court raised beginning with *DeRolph I.*

Respectfully submitted,

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